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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 363

GEORGIA POWER COMPANY, PETITIONER,

vs.

CITY OF DECATUR

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED AUGUST 30, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,494)

( )

SUPREME COURT OF THE UNITED STATES

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IN SUPERIOR COURT OF DE KALB COUNTY

Bill of Exceptions—Filed Sept. 24, 1928; in Supreme Court, Oct. 2, 1928

Caption

Be it remembered that on the 15th day of September, 1928 there came on to be heard in the Superior Court of De Kalb County Georgia and before the Honorable John B. Hutcheson, Judge of said court the case of the City of Decatur vs. Georgia Railway & Power Company, the same being a petition for equitable injunction and other relief by the plaintiff and a cross-bill praying equitable relief by defendant, all as contained in the pleadings in said case.

By agreement of parties the Judge aforesaid heard said case as both Judge and jury, you tried the same under such agreement upon both the law and the facts as introduced in evidence, and rendered a final decree in said case.

Upon said hearing the following evidence was introduced as a statement of facts agreed upon by the parties, to wit:

Statement of Facts

"(1) The Collins Park & Belt Railroad Company was incorporated under the Acts of the General Assembly of the State of Georgia, approved August 16th, 1889 (See Acts 1889 page 211) under the corporate name and style of "Collins Park & Belt Railroad Company." Said act is as follows:

Section 1. Be it enacted by the General Assembly of the State of Georgia, That James D. Collins, H. L. Woodward, S. H. Venable, J. R. Collins, Charles E. Thompson, S. K. Ozborn, W. J. Collins and Thomas McClellan, and their associates, successors and assigns, be and the same are hereby incorporated and made a body politic and corporate under the name and style of "Collins Park and Belt Railroad Company."

Section 2. Be it further enacted, That before said Company shall begin its work upon any of its lines of railroad

in the City of Atlanta, it shall obtain the assent of the corporate authorities of said city to the same; and before it shall begin its work on any of the public roads in the counties herein mentioned, it shall first obtain the assent of [fol. 2] the authorities therein having charge of roads, respectively.

Section 3. Be it further enacted, That said corporation shall have full power and authority to survey, lay out, construct and equip, use and enjoy, lines or routes of street railroad in the City of Atlanta, and in the County of Fulton, as follows, to wit; Lines and routes running to and from such points as it may desire, on and over the following streets in Atlanta, to wit: Orme, North Avenue, State, Luckie, Marietta, and along such other streets as it may desire, and have authority to build a belt road around the said City of Atlanta in said County of Fulton.

Section 4. Be it further enacted, That said corporation shall also have power and authority from time to time to survey, lay out, construct, equip, use and enjoy such other routes or lines of railroad in the City of Atlanta, and in the Counties of Fulton, Gwinnett, Cobb and De Kalb, in addition to those especially named in this Act, and to extend any or all of those named, and build branches thereto whenever it deems it to its interest to do so: Provided, that before said corporation commences to construct any part of such line, or lines, or routes, it shall obtain, if such construction is to be within the corporate limits of the City of Atlanta, the consent of the proper authorities of said City. Whenever said contemplated railroad shall desire to pass over the land of another, and said railroad company and the owner of said land shall fail to agree as to compensation for such right-of-way over such lands, said owner shall have the right to select one arbitrator and the said Company shall have the right to select an arbitrator, and a third arbitrator shall be chosen as umpire, whose proceed- [fol. 2½] ings and powers shall be the same as allowed and authorized by the Code of 1882, in other cases submitted to arbitration.

Section 5. Be it further enacted, That this corporation is hereby granted all the right, powers, franchises and privileges heretofore granted to the Metropolitan Street Rail-

road Company in sections two (2), five (5), six (6), eight (8), and nine (9), of an Act entitled "An Act to incorporate the Metropolitan Street Railroad Company, and to define its rights, powers and privileges, and for other purposes," approved December 12, 1882, and said sections two, five, six, eight and nine are hereby made a part of the Collins Park and Belt Railroad Company. Said corporation by said name shall have continuous succession, and shall be able and capable to sue and to be sued, to plead and to be impleaded unto, and may have and use a common seal and may alter and renew the same at pleasure, and may make, alter and repeal such by-laws governing its members, officers, attorneys, agents, employees and persons dealing or having business with it, as it deems proper; provided, said by-laws are not in conflict with the laws of this State, or of the United States, and it may make contracts, borrow money, issue bonds, notes and other evidences of debt, and secure the same by such mortgages or deeds of trust as it deems proper. And it may acquire, purchase, receive and hold such property real and personal, as it deems best and most profitable to its purposes, and may dispose of any part thereof not absolutely necessary to the running of its road, at pleasure. It shall have power to fix rates of tolls for carriage of persons and property, and to collect the same, and it shall have all the powers, facilities, rights and franchises necessary or proper to successfully accomplish and maintain the objects of its incorporation. [fol. 3] Said corporation, for the purpose of making a connected line, or for the purpose of crossing any other street railroad, with its road, may lay its tracks upon and occupy with its railroad or tracks, any street or streets upon which any other street railroad company may have its tracks, or may have the right to lay its tracks at the time; Provided, it does not at any one place occupy more than five full city blocks front, contiguous to each other, and if the proper municipal authorities determine that the street or streets so sought to be occupied by the tracks of both roads is not side enough for both of said roads to have separate tracks, and at the same time to leave space enough for the passage of the vehicles, then, and in that event, said corporation shall have power and authority to condemn to its use such parts of said other railroad as may be necessary for the purpose of making a connected line, or of crossing any

other street railroad with its road, not exceeding in any way one place three full city blocks front contiguous to each other. Said condemnation shall be made after the decision is made as aforesaid, by said municipal authorities, that such condemnation is necessary to the convenience of the city in the exercise of its control over the streets of said city, by pursuing the provisions and mode pointed out in section six of this Act; and said track or road so condemned shall be used by each of said roads, each having equal rights thereon; and in maintaining said track or road so used in common, each company using the same shall pay a prorata in proportion to the number of cars run on said tracks; Provided, that the part of said track of any other railroad company, which may be condemned with the consent of said municipal authorities, shall be so used by each of said companies using the same that neither one shall [fol. 4] damage the business of the other nor delay its cars running upon said track so condemned.

Should said corporation find it necessary in the construction of its road or roads, to have the lands of private persons or corporations, said corporation may acquire the same by pursuing the mode pointed out and prescribed in section 12 of an Act to provide a general law for the incorporation of railroads, and to regulate the same, approved September 27, 1881, and found upon pages 161, 162 and 163 of the printed volume of laws of 1880 and 1881.

The books of subscription to the capital stock of said corporation shall be first opened under the superintendence of said persons named in the first section of this Act, or a majority of them acting in one person or by proxy, in such place, and on such day or days, as said persons, or a majority of them, may deem expedient; and all subscriptions shall be paid in cash, or that which such persons may deem its equivalent, in installments as called for by the board of directors. Said persons named shall act as a provisional board of directors until said corporation is organized, which shall be done within 30 days after the requisite subscriptions are obtained.

The affairs of said corporation shall be managed by a board of directors, to consist of five persons, themselves stockholders in their own right, a majority of whom shall constitute a quorum. They shall be elected annually by the stockholders at such time and place as may be fixed in

the by-laws, and such time and place shall be published at least ten days before the election, in some paper published in Atlanta. They shall hold their offices until their successors are elected. They shall elect one of their number president and another vice president, and they shall have such powers and duties as may be prescribed in the by- [fol. 5] laws. The directors shall have full power and authority to manage and conduct, and to prescribe rules for managing and conducting all the business of the corporation, of every kind.

Section 6. Be it further enacted, That the capital stock of said corporation shall be fifty thousand dollars, divided into shares of one hundred dollars each. Said capital stock may be increased, from time to time, to any sum not exceeding three million dollars; Provided, said increase be authorized in each instance by a direct vote of a majority of all the stock of the Company, at an annual meeting or at a meeting called for that purpose. But said corporation may organize and commence business whenever the sum of seven thousand dollars is subscribed, and this charter to remain of force for and during the period of thirty years.

Section 7. Be it further enacted, That the said corporation shall have the right to use, in the running of its trains, animal, steam, electric and all other mechanical powers now known or hereafter discovered.

Section 8. Be it further enacted, That the incorporators herein named shall constitute a board of directors, who shall hold their offices until their successors are elected and qualified.

Section 9. Be it further enacted, that the rights, powers and privileges herein granted shall cease and be of no effect unless three miles of the road is built and in running order within three years from the granting of this charter, and this charter shall not be transferred until at least five miles of said road is completed and ready for rolling stock.

Section 10. Be it further enacted, That all laws and parts of laws in conflict with this Act be, and the same are, hereby [fol. 6] repealed.

Approved August 16, 1889.

(2) By certificate of the Secretary of the State of Georgia issued the 28th day of May 1900 the name of Collins Park & Belt Railroad Company was duly changed to "Atlanta Rapid Transit Company." Certificate of the Secretary of State is as follows:

"STATE of GEORGIA,
Office of Secretary of State,
Atlanta:

To whom it may concern, Greeting:

Whereas, the Collins Park and Belt Railroad Company, a corporation created and existing under the laws of this State, has filed in this office, in terms of the law, a petition asking that its charter be amended by changing its corporate name from Collins Park and Belt Railroad Company, to Atlanta Rapid Transit Company, and has complied with all the requirements of the law in such cases made and provided:

Therefore, The State of Georgia hereby amends the Charter of the said Collins Park and Belt Railroad Company by changing its corporate name from Collins Park and Belt Railroad Company to Atlanta Rapid Transit Company.

Witness my hand and the seal of this State, this twenty eighth day of May, 1900.

Philip Cook, Secretary of State."

(3) On the 4th day of September 1899 the City of Decatur granted a permit to Collins Park and Belt Railroad Company set out as exhibit "A" to the petition as follows:

"Atlanta, Ga., August 26th, 1899.

To the Honorable Mayor and General Council of the City of Decatur, Georgia.

[fol. 7] The Collins Park and Belt Railroad Company respectfully petitions your Honorable Body to grant to it the right and franchise to construct, electrically equip and operate the following lines of street car tracks over and upon the following streets of the City of Decatur:

Commencing at the City Limits on Decatur Street, i. e., the street running along the north side of the Georgia Rail-

road and extending along said street east as far as Candler Street or the next street east of and parallel to Candler Street; thence along Candler Street or said next street east of and parallel to Candler Street to Sycamore Street; thence west along Sycamore Street to McDonough Street; thence along McDonough Street to a connection with said line petitioned for on Decatur Street or road, with the right to make such sidings and turnouts as may be necessary.

And petitioners will ever pray.

Collins Park and Belt Railroad Company, by C. J. Simmons, President.

September 4th, 1899.

The following ordinance was read by councilman Pattillo, to wit:

Be it ordained, that from and after the passage of this Ordinance, that Franchise be granted the Collins Park & Belt Railroad Company, to build, electrically equip and operate an electric street railroad in the Town of Decatur from the western town limits on North Railroad Avenue to Oak Street, thence along Oak Street to Broad Street; thence along Broad Street to East Court Square; thence along East Court Street or square to South Court Street or Square; thence along outh Court Street or Square to McDonough Street; thence along McDonough Street, to North Railroad Avenue, or to leave North Railroad Avenue [fol. 8] at McDonough Street; thence direct along McDonough Street to Court Square; thence east along South Court Square to East Court Square; thence North along East Court Square to Broad Street, or to build, electrically equip and operate an electric street railroad on any of the above named streets. Wherever this route runs along streets already occupied by the track of the Atlanta Railway Company the said track shall be removed and replaced by the Collins Park & Belt Railroad Company and at the latters expense so that the tracks of the two companies shall be as nearly as possible equally distant from the sidewalks except at corners.

The tracks of the Collins Park & Belt Railroad Company shall be laid on the south side of Broad Street and west

side of McDonough Street from the tracks of the Atlanta Railway Company. The Streets shall be left in as good condition except for the tracks as before the tracks were laid, and the tearing up and replacing the streets shall be done under the supervision of the Street Committee. The Town of Decatur reserves the right to regulate the speed of cars and the right to make all such regulations as pertain to police power of Decatur. All overhead and other construction shall be done in a reasonably safe manner and the street committe- shall see to this, and all matters pertaining to grades shall be subject to the approval of the street committee.

This is the line in question in this suit.

(4) By certificate of the Secretary of the State of Georgia issued the 28th day of January, 1902 the Georgia Railway & Electric Company was incorporated. The petition for incorporation and certificate is attached as follows:

"GEORGIA,
Fulton County:

To the Secretary of State of the State of Georgia:

[fol. 9] The petition of H. M. Atkinson, P. S. Arkwright, R. E. Cullinane, S. J. Bradley, M. B. Lipscomb, F. M. Sick, G. W. Brine, J. G. Rossman, J. R. Hunter and W. B. Stovall, all of Atlanta, Georgia, shows that they desire for themselves, their associates, successors and assigns, to be incorporated as a street and suburban railway company, under the name of the Georgia Railway & Electric Company. The length of said road will be about one hundred and forty miles, as near as can be estimated. The general direction of same is to be through the streets of the city of Atlanta, and upon the public roads and private rights of way of said company in the counties of Fulton and DeKalb; also through the town of Edgewood, Decatur, East Point, Oakland City, in said counties, with the right hereafter to extend its lines to, in and through the City of Marietta and the county of Cobb, and such other towns of said counties as said Railway Company may desire.

Said corporation desires power to purchase and own existing lines, or to construct their own lines, upon the fol-

lowing streets in the following named places: in the City of Atlanta, upon Edgewood, Piedmont, Highland, Angier, Euclid, Moreland and Ponce de Leon Avenues; Peachtree, Decatur, Marietta, Elizabeth, Hurt, Boulevard, Jackson, Pryor, Houston, Hilliard, Courtland, Pine, Fourteenth, Tenth, Broad, Luckie, Spring, Powers, West Peachtree, Linden, Gray, Simpson, Lambert, Mitchell, Nelson, Tatnall, East and West Hunter, Walker, Peters, Leonard, Ella, Ashby, Gordon, Alabama, Park, Lee, Smith, Crumley, Pulliam, Clark, Washington and Ormond Streets; Ridge, Georgia, Cherokee, Woodward, Capitol, Central, Park, West End, Lucile, Lake Jones, Madison and Trinity Avenues; Waverly Place, Fair, Frazer, Forsyth, Church, Burns, South Boulevard, Grant, Cain, Orme, Mills, Gallatin, Ellis, Irwin, Sampson, McLendon, Cooper, Richardson, McDaniel, [fol. 10] Glenn, Davis, Magnolia, Chestnut, Haynes, Chapel, Clarke, Kellet, Hill, Rock, Elliott, Walton, Alexander, Kennedy, Howell, Ivy, Juniper, Bass and Crew Streets; Atlanta, Hemphill, Dood, Augusta, Greens Ferry, Oglethorpe, Glynwood, Hendricks, Auburn, North and Forrest Avenues.

In the Town of Decatur: North Railroad Avenue, Court Streets or Square, Oak, Broad, McDonough, Ansley, Haddock, Atlanta and Depot Streets.

In the Town of Edgewood: On McLendon Street and Decatur Road.

In Oakland City: Through Forrest Park and through Oakland City to a point opposite the McPherson Barracks, and in Oakland City and East Point along the East Point Public road.

The said right to build and construct, own or operate to apply to any part or all of said streets or parts thereof in the discretion of said Company, and the said Company to have the right to construct, own, build, purchase, and operate its lines of railway upon the public roads of said three counties hereinabove named, and upon any and all other streets and parts of streets in said City of Atlanta, or other towns and cities in said three counties; the purpose being to purchase and acquire, or build and construct, and maintain and operate, a complete system of street and suburban railroads for the purpose of transporting persons and property in the cities and town of Atlanta, De-

catur, Edgewood, East Point, Oakland City and in the Counties of Fulton and DeKalb, with the right of extension as aforesaid, and to connect the various towns and various points in said counties with each other, and with such other points to which the same may be from time to time extended. They desire power also to purchase and own, construct or build, and maintain—and operate, any of their [fol. 11] lines, or of their works, power houses and necessary structures, upon private lands or rights of way, and the same to acquire by purchase or contract, or by the exercise of the right of eminent domain and condemnation.

They desire also the power to own and operate electric plants, and furnish electric light and power; (also to own and operate steam heating plants) and to buy, own, hold and use property necessary or convenient to the exercise of such powers and all others that it may possess, and to have all the powers in these respects specified by the laws of the State of Georgia, and particularly those in respect to electric railroad companies, together with the right to use and occupy the streets, roads and avenue and public places in the cities, towns and counties where they may operate, or to condemn property for the purpose of erecting and maintaining their said lines for the transmission of said light, heat and power, subject to the provisions in regard to such use or condemnation as are provided in the law for the incorporation of railroads.

The Capital stock of said corporation shall be three million dollars, of which at least three hundred thousand dollars may be preferred stock, with the right to increase the amount of either said preferred or common stock, or both, in the manner provided by law for the increase of capital stock of railroads; the terms and limitations thereof, and the rights and privileges of such preferred stock over the common to be such as are fixed in the resolution authorizing the issue of such preferred stock, and said corporation may, if it sees fit, make classes of such preferred stock. Said corporation may retire or decrease said capital stock to any extent not less than the minimum herein prescribed.

The place where the principal office of said corporation is to be located will be the City of Atlanta, Georgia.

The terms of existence of said corporation, and of the [fol. 12] continuance of its rights, powers and privileges shall be one hundred and one years, with the right of renewal and continuance thereafter as may be provided by law. Said corporation may at any time, during its existence, however, by a majority vote of its entire stock, wind up its business, dissolve and surrender its charter. Said corporation shall also have the right to sell, dispose of, assign, transfer and convey all or any part of its property, privileges and franchises at any time when authorized by a majority vote of its stockholders.

Petitioners intend in good faith to go forward without delay to secure subscriptions to the Capital Stock, acquire or construct, equip, maintain and operate said railroads. They request to be incorporated under the laws of this State applicable to the incorporation of street and suburban railroads, with all the powers specified in the Code of Georgia providing for the incorporation of railroads as contained in Section 2165 to 2179 inclusive of the Civil Code of 1895, together with such additional powers as are conferred specially upon electric street railroads, as contained in sections 2181 and 2184 inclusive of said Civil Code of 1895. The corporation to be formed will have the right to apply for and accept by a majority vote of its shareholders any additional powers or amendments to its charter, whether fundamental or immaterial; and whether conferred; or to be acquired under general laws or special acts.

They have given four weeks' notice of their intention to apply for this charter, by the publication of this petition in the newspapers in which the sheriffs' advertisements are published in each of the counties of Fulton, De Kalb and Cobb, once a week for four weeks before the filing hereof.

H. M. Atkinson, P. S. Arkwright, S. J. Bradley, M. B. Lipscomb, F. M. Sisk, J. G. Rossman, G. W. Brine, R. E. Cullinane, W. B. Stovall, J. R. Hunter.

[fol. 13] STATE OF GEORGIA:

Office of Secretary of State, Atlanta, Ga.

To all to whom these presents may come, Greeting:

Whereas, In pursuance of an Act of the General Assembly of the State of Georgia, approved December 17th, 1892, and

Acts amendatory thereof, H. M. Atkinson, P. S. Arkwright, R. E. Cullinane, S. J. Bradley, M. B. Lipscomb, F. M. Sisk, G. W. Brine, J. G. Rossman, J. R. Hunter and W. B. Stovall, all of Atlanta, Fulton County, Georgia, having filed in the Office of Secretary of State, a certain petition seeking the formation of a corporation to be known as Georgia Railway & Electric Company, with its principal office in Atlanta, Georgia, with a capital stock of Three Million Dollars ($3,000,000) of which at least Three Hundred Thousand Dollars may be preferred stock, with the right to increase either common or preferred stock, or both, as provided by law, for the purpose of purchasing, owning, constructing, equipping, maintaining and operating a Street and suburban railroad within the City of Atlanta, Georgia, and to and from said City to diverse points within the Counties of Fulton and De Kalb, in said State, (with the right hereafter to extend according to law, its lines, as stated in the petition for incorporation) along the routes indicated in the application for this certificate, a copy of which said application is hereto attached and made a part hereof; said corporation to be chartered for the term of One Hundred and One years and to have, exercise and enjoy all the rights, powers and privileges incident to corporations of such character under the laws of this State; especially the powers and privileges of transporting persons and property over its Street and Suburban lines and to charge for the carriage thereof; and also to purchase and own, build, maintain [fol. 14] and operate electric light and power plants and to furnish and sell electric light and electric power, and having complied with the statutes in such cases made and provided:

Therefore, the State of Georgia hereby grants unto the above named persons, their successors and assigns, full authority by and under the said name of Georgia Railway and Electric Company to exercise the powers and privileges of a corporation for the purpose above stated, subject to the provisions of Article Four (4) of the Constitution of this State, and all the laws governing railroad companies of force at the date of this certificate or that may hereafter become of force, either by constitutional or statute law, or by any rules and regulations of the Railroad Commission of this State, or otherwise, which govern and control the operation of railroads in this State.

In witness*eth* whereof, these presents have been signed by the Secretary of State, and to which is annexed the Great Seal of the State, at Atlanta, Georgia, this 28th day of January, 1902.

Philip Cook, Secretary of State.

(5) By deed dated March 28th, 1902 the Atlanta Rapid Transit Company conveyed all of its property, together with its different lines of railway to the Georgia Railway & Electric Company.

(6) "An ordinance granting the right to the Georgia Railway & Electric Company to remove and to discontinue the operation of the tracks and structures formerly known as the Atlanta Railway Company in the Town of Decatur, Georgia, under certain conditions and restrictions in said ordinance set forth.

Whereas, the said Georgia Railway and Electric Company, which has succeeded to all the property rights and [fol. 15] franchises of said Atlanta Railway Company, did heretofore commence to tear up the tracks and other structures formerly known as the Atlanta Railway Company in the said Town of Decatur, with the intention of discontinuing the operation of said line of railway.

And, Whereas, said Georgia Railway & Electric Company was prevented from removing said structures, and from discontinuing the operation of said line of railway by a temporary restraining order granted by the Judge of the Superior Court of Fulton County upon the petition of said Town of Decatur against said Georgia Railway & Electric Company, which said petition is now pending in said court, and returnable to the March Term, 1903;

And, Whereas, the President, Vice-President and Manager of said Georgia Railway & Electric Company have appeared before the Mayor and Council of said Town of Decatur on several occasions, and urgently requested that said Georgia Railway & Electric Company be allowed by said Mayor and Council to take up and discontinue the operation of said Atlanta Railway line, urging as a reason for such action by said Mayor and Council that, if allowed to take up and discontinue said line known formerly as Atlanta Railway Company, said Georgia Railway & Electric Company could and would give to the citizens of said Town of De-

catur better street car facilities upon another parallel line of street railway between the City of Atlanta and the Town of Decatur owned by said Georgia Railway & Electric Company, and formerly known as the Atlanta Rapid Transit line, the same being the line of street railway running from Atlanta to Decatur along the Georgia Railroad and immediately north thereof.

Now, therefore, be it ordained by said Mayor and Council, and it is hereby ordained by said authority that the authority, right, permission and consent are hereby granted to said Georgia Railway and Electric Company to discon- [fol. 16] tinue the operation of, abandon and remove the tracks, poles and other structures constituting the street railway line referred to and known as the line of the Atlanta Railway Company in the Town of Decatur, extending along and over the following route in said Town of Decatur, to wit:

Entering said town on the western side thereof at what is known as Swanton' Hill, and running thence in a northeasterly direction until it strikes what is known as Electric Avenue; thence along said Electric Avenue in a northerly direction to Atlanta Street; thence along Atlanta Street in an easterly direction to South Court Square, which is a continuation of Atlanta Street; thence along said South Court square to McDonough Street; thence south along McDonough Street to Depot or Herring Street; thence in a southeasterly direction along Depot or Herring Street to North Railroad Avenue; thence east along said North Railroad Avenue to the eastern limit of said town, and continuing east a short distance beyond said town limit; thence turning north, and running north about the distance of two blocks, thence turning west, and running west until it again strikes the eastern limit of said town where said limit crosses Broad Street; and thence continuing west along said Broad Street in said town to the North Court Square, which is a continuation of said Broad Street; thence continuing west along said North Court Square to West Court Square; thence along West Court Square to South Court Square, where said line connects with the same line described as entering said town, forming a loop; upon the conditions and restrictions hereinafter specified.

Section 2. Be it further ordained, that in consideration of the above-mentioned rights granted by said town to said

Georgia Railway & Electric Company, and in consideration of the benefits that said Georgia Railway & Electric Company will derive from discontinuing and taking up the [fol. 17] structures comprising said Atlanta Railway Company, the said authority, rights, and privileges above referred to are granted and conferred only upon conditions that this ordinance shall first be accepted by said Georgia Railway & Electric Company and that said Georgia Railway & Electric Company, its successors and assigns, whether by contract, or by operation of law, shall be bound to do the following things, to wit:

First. Upon the removal of the tracks and structures above referred to, to restore the surface of those streets from which such tracks and structures shall be removed to as good condition as the same are now in.

Second. To never charge more than five cents for one fare, upon its main Decatur line, above referred to as the Rapid Transit line, for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta and the trip either way shall include the entire loop in the Town of Decatur, hereinafter described, though a greater fare may be charged when passengers are transported between the hours of 12 o'clock midnight and five o'clock A. M.; the said Rapid Transit line above referred to having the following route, to wit: Commencing in the City of Atlanta at the intersection of Peachtree Street and Edgewood Avenue and running thence in an easterly direction along Edgewood Avenue to Hurt Street; thence in a southerly direction along Hurt Street to Decatur Street; thence along Decatur Street, which is immediately north of the Georgia Railroad, in an easterly direction to a point where said street is intersected by the line between the Counties of Fulton and De Kalb, thence continuing in the [fol. 18] same general direction, immediately north of said Georgia Railroad until it intersects the Western limit of said town of Decatur where it crosses North Railroad Avenue; thence continuing in the same direction in the Town of Decatur along said North Railroad Avenue to North Candler Street, thence along North Candler Street north

to a short distance to a continuation of said North Railroad Avenue, thence in an easterly direction along said continuation of said North Railroad Avenue to Oak Street, thence north along said Oak Street to Broad Street, thence west along said Broad Street to East Court Square; thence south along east Court Square to South Court Square, thence west along said South Court Square to McDonough Street, thence south along said McDonough Street to said North Railroad Avenue, there connecting with said line a short distance from where it enters said Town of Decatur coming from Atlanta and forming a complete loop within the Town of Decatur.

Third. To grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the Town of Decatur upon said Rapid Transit line to any point within the City of Atlanta on any of its lines in said City, and vice versa, which does not result however in carrying the passenger on a parallel line, or in the same general direction from which he came, provided such transfer is requested at the time of the payment of the fare; and provided the passenger shall abide by such reasonable rules and regulations as the Company may make, so as to limit the time in which such transfer is used, in order that it may be available only for the first connecting car, and in order to cover such other matters as the Company may deem necessary or proper to protect the Company from imposition, abuse, or assignment of such transfer, and to avoid liability in damages from mistakes that may be made by the passengers or the em-
[fol. 19] ployees in regard to such transfers.

Fourth. To gradually from time to time, as it may obtain permission so to do and may have funds available for such purpose, double track said Rapid Transit line from terminus to terminus, the loop already described in the Town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years, in the event it can obtain permission to construct said double track, which said double track, when completed shall be maintained in a substantial safe and expeditious manner and shall be operated with cars and rolling stock kept in a safe and comfortable condition. Permission to construct said double track in the Town of Decatur is hereby granted.

Be it further ordained that the terms of this ordinance shall be accepted by said Georgia Railway and Electric Company at a meeting of its Board of Directors, so that the same may appear upon the minutes of said Board of Directors, within thirty days from the passage thereof, and the terms of this ordinance shall not be effective until so accepted, and an agreement embodying the terms hereof shall have been entered into by the said Town of Decatur and said Georgia Railway & Electric Company, executed by the Mayor and *and* Clerk of said Town, on the part of said Town, and by the President and Secretary of said Company, or by such officers of said Company as under its charter are authorized to execute deeds to realty, which agreement shall in addition to the above terms, reconvey to said Town any rights, grants or franchises that said Georgia Railway & Electric Company may have acquired within said Town of Decatur as successor to the rights, grants and franchises of the said Atlanta Railway Company acquired from said Town of Decatur.

[fol. 20] Section 3. Be it further ordained that all ordinances or parts of ordinances in conflict herewith are hereby repealed.

Be it resolved by the Board of Directors of the Georgia Railway & Electric Company that the ordinance adopted by the Mayor and Council of the Town of Decatur, on March 3rd, 1903, conferring the right and authority upon this Company to discontinue the operation of, abandon and remove the tracks and poles and other structures constituting the street railway line known as the Atlanta Railway Line, in said Town of Decatur, and covering the route described in said ordinance, be and the same is hereby accepted upon the terms set forth in said ordinance; and the terms and conditions set forth in said ordinance to be approved by this Company are hereby agreed to by it in consideration of the right to remove said line conferred by said ordinance.

Be it further resolved that the President and Secretary of this company are hereby authorized to sign and enter into with said Town of Decatur in the name of one half of this Company, an agreement embodying the terms of said ordinance in accordance with the requirements of said ordinance.

This agreement, made this 1st day of April, 1903, by and between the Town of Decatur, a municipal corporation in the County of De Kalb, State of Georgia, acting by and through its mayor and council, party of the first part, and the Georgia Railway & Electric Company, a corporation under the laws of Georgia, with its principal office in the County of Fulton, party of the second part, witnesseth, that,

Whereas, the mayor and council of said Town of Decatur did on March 3rd, 1903, adopt an ordinance, a copy of which is hereto attached and made a part hereof:

And, whereas, the terms of said ordinance were accepted [fol. 21] by said Georgia Railway & Electric Company at a meeting of its Board of Directors held on March 31, 1903, a copy of the resolution adopted by said Board of Directors being hereto attached and made a part hereof.

Therefore, in accordance with the provisions of said ordinance and in consideration of the mutual covenants and agreements herein contained, the parties hereto contract and agree with each other as follows:

1. Party of the first part hereby confers the authority, right, permission and consent of said Georgia Railway & Electric Company and contracts and agrees that said Company shall be allowed and permitted to at once discontinue the operation of, abandon and remove the tracks, poles and other structures constituting the street railway line, known as the line of the Atlanta Railway Company in the Town of Decatur and extending along and over the route in said Town of Decatur and specified in said ordinance.

2. The said Town of Decatur further agrees to do and perform all things provided to be done or performed on its part by the ordinance hereinbefore referred to.

3. In consideration of the benefit of said party of the second part from discontinuance, abandonment and removal of the said line of Railway hereinbefore referred to, and in further consideration of the benefits to be derived by it from the performance on the part of the Town of Decatur of the provisions undertaken to be performed by it under said ordinance, said party of the second part hereby contracts and agrees with the said Town of Decatur that it (the said Georgia Railway & Electric Company)

will, upon its part, do and perform all things specified in said ordinance to be done and performed by it, and will keep and observe the conditions and terms of the said ordinance.

4. Said Georgia Railway & Electric Company further hereby surrenders to said Town of Decatur the franchise [fol. 22] formerly belonging to the Atlanta Railway Company, in said Town of Decatur, and conveys and quitclaims to the said Town of Decatur all right, title or interest which the said Georgia Railway & Electric Company has or may have had in and to the said franchise owned by the Atlanta Railway Company, in the said Town of Decatur.

In witness whereof, the parties hereto have hereunto set their hands and seals on the day and year hereinabove written as the date hereof; the Town of Decatur acting by and through its Mayor and Clerk, and the Georgia Railway & Electric Company acting by and through its President, and Secretary, all hereunto authorized, executed in duplicate.

Town of Decatur (Seal), by J. W. Mayson, Mayor. L. J. Steele, Clerk. (Seal of Town of Decatur.) Georgia Railway & Electric Company (Seal), by P. S. Arkwright, President, Thos. K. Glenn, Secretary. (Seal of Georgia Railway & Electric Co.)

Signed, sealed and delivered as to Town of Decatur, in De Kalb County, Georgia, in the presence of Ben E. Ragsdale.

W. M. Ragsdale, Ordinary.

Signed, sealed and delivered as to Georgia Ry. & Elec. Co. in the County of Fulton, State of Georgia, in the presence of L. P. Pairo.

R. E. Cullinane, Notary Public, Fulton Co., Ga.

(The same as set out in Exhibit B of the petition.)

[fol. 23] (7) The Georgia Railway & Power Company was chartered under the laws of the State of Georgia under certificate issued by the Secretary of the State of Georgia dated the 16th day of October 1911. A copy of the petition and the certificate of incorporation being as follows:

"To the Secretary of *the* State of the State of Georgia:

The petition of Charles Magee, of Toronto, Canada, John M. McWhinney, of Toronto, Canada, George A. Kingston, of Toronto, Canada, Jack J. Spalding of Fulton County, Georgia, Forrest Adair of the City of Atlanta, Georgia, Alex C. King, of the City of Atlanta, Georgia, E. Marvin Underwood, of the City of Atlanta, Georgia, Hughes Spalding of Fulton County, Georgia, George W. Adair of the City of Atlanta, Georgia, shows that their residences are as stated above, that they desire for themselves, their associates, successors and assigns and all persons who may become stockholders in such company, to be incorporated for a period of one hundred and one year with the privilege of renewal, as a suburban, interurban and street railroad company under the name of Georgia Railway and Power Company.

The length of said road will be about two hundred miles as near as can be estimated.

The general direction of said road will be from the Town of Stone Mountain, De Kalb County, Georgia, in a generally westwardly direction through the town of Clarkston, and to and into the Town of Decatur, all in De Kalb County, Georgia, also in, upon or through the streets of the cities and Towns of Decatur, East Lake, Lakeview, Oakhurst, Kirkwood, and Atlanta in the County of DeKalb, State of Georgia, and of Atlanta, East Point, College Park and Hapeville in the County of Fulton, State of Georgia, and upon public roads and private rights of way in the said cities and towns and in the said counties of DeKalb and [fol. 24] Fulton in the State of Georgia, and in the territory contiguous to the said counties of DeKalb and Fulton, with the right hereafter to extend its lines and construct and acquire additional lines of street, suburban and interurban railways to, in and through such other cities, towns and counties as said railway company may desire, it being the purpose of said company to hereafter construct and operate such additional lines.

The Counties through which said road will probably run are the Counties of DeKalk and Fulton.

The names of the principal places from which and to which the said road is to be constructed are the cities and towns of Stone Mountain, Clarkston, Decatur, Kirkwood,

Oakhurst, Lakeview and East Lake, in the County of De Kalb, State of Georgia, and of Atlanta, East Point, Hapeville, College Park in the County of Fulton, State of Georgia and various other places and points in the Counties of De Kalb and Fulton.

The said company proposes to construct and build or purchase, lease and acquire lines of street and suburban railroad with their franchises in the cities and towns of Stone Mountain, Clarkston, Decatur, East Lake, Lakeview, Oakhurst, Kirkwood and Atlanta in the County of DeKalb, and of Atlanta, East Point, College Park, and Hapeville in the County of Fulton, and in the following streets of said cities and towns, namely:

In the Town of Stone Mountain: On Main Street and private rights of way.

In the Town of Clarkston: On Main Street and or Roland Avenue and or other streets names unknown, and private rights of way.

In the Town of Decatur: Along Railroad Avenue, Decatur Public Road, Oak Street, Ponce de Leon Avenue, Court House Square, McDonough Street, College Avenue, Cand-
[fol. 25] ler Street, Ansley Street, Haddock Street, Sycamore Street, Covington Road and private rights of way.

In the Town of East Lake: Morgan Avenue and private right of way.

In the Town of Lakeview: Private rights of way.

In the Town of Oakhurst: Along Railroad Avenue, De Kalb Avenue, Decatur Public Road, private rights of way.

In the Town of Kirkwood: Along Railroad Avenue or DeKalb Avenue, Decatur Public Road, Boulevard DeKalb, private right of way.

In the City of Atlanta: On Decatur, Ivy, Gilmer, Hurt, Elizabeth, McLendon, North and South Boulevard, Jackson, Butler, North and South Pryor, Houston, Hilliard, Irwin, Sampson, Courtland, Juniper, Twelfth, Thirteenth, Pine, Tenth, Fourteenth, Peachtree, West Peachtree, Marietta, Brady, Walton, North and South Broad, North and South Forsyth, Spring, Luckie, Hunnicutt, Plum, Carnegia Way, West Cain, Orme, Mills, Whitehall, Park, Lee, Gordon, Capitol Square, East and West Mitchell, Davis, Magnolia, Gray, Kennedy, Simpson, Ashby, Elliott, Rock, Lambert, Alabama, East and West Hunter, Nelson, Chappel, East and West Fair, Chestnut, Walker, Peters, Leonard,

Ella, Tatnall, Adamsville Road, Cooper, Richardson, McDaniel, North and South Pryor, McDonough Road, Bass, Pulliam, Ormond, Washington, Jefferson, Crew, Estoria, Flat Shoals, Kelly, Grant, Frazier, Hill, Berne Streets; Piedmont, Edgewood, DeKalb, Euclid, Moreland, Auburn, Highland, Lake, North, Forrest, Angier, Ponce de Leon, Hemphill, Stewart, Jones, English, Bellwood, Madison, Greensferry, West End, Lucille, Georgia, Ridge, Central, Dodd, Weyman, Milton, Lakewood, Trinity, South and North Moreland, Delaware, Underwood, Capitol, Woodward, Glenwood, Augusta, Cherokee, Park and Confederate Avenues, East Point, Chert Road, private rights of way, Adamsville Road, McDonough Road, Flat Shoals Road.

[fol. 26] In the City of East Point: Along the street known as College Park and East Point Road or Main Street.

In the City of College Park: Along College Park and East Point or Main Street.

In the Town of Hapeville: Along Central Avenue, East Point and Hapeville Road, Atlanta Avenue, College Street.

The said company desires the power to purchase, lease, acquire, build, construct, own, maintain and operate the street, suburban and interurban railways above described for the purpose of transporting passengers and property, together with the right of extending the same, and constructing and acquiring other lines of street, suburban and interurban railways, to any other point or points, over any route or routes in the cities and towns above referred to or other cities and towns, and in the said Counties of DeKalb and Fulton, or in the territory adjacent thereto or elsewhere.

The said power to purchase, lease, acquire, build, construct, own, hold, maintain and operate street, suburban and interurban railroads with their franchises to apply to any part or all of the streets, avenues and public places above named in the cities and towns or any parts thereof in the discretion of the said company, and to any and all other streets, avenues, public places and private rights of way in the said cities and towns of Atlanta, East Point, College Park, Hapeville, Kirkwood, Oakhurst, Lakeview, East Lake, Decatur, Clarkston, and Stone Mountain, and to any and all other public roads, private rights of way

in the said counties of Fulton and DeKalb, the consent to occupy which may be granted by the proper public authorities, the purpose being to purchase, lease, acquire, build, construct, own, hold, maintain and operate a complete system of street, suburban and interurban railroads for the [fol. 27] purpose of transporting persons and property in the cities of Stone Mountain, Clarkston, Decatur, East Lake, Lakeview, Oakhurst, Kirkwood, Atlanta, East Point, College Park and Hapeville, and in the Counties of DeKalb and Fulton with the right of extension as aforesaid, and connect the said various towns and cities and various points in said cities and towns and in the said counties with each other and with such other points within or without the said cities and towns and within or without the said counties to which the said road may be from time to time extended.

The said company also desires the power to purchase, lease, acquire, build, construct, own, hold, maintain and operate any part or all of its lines, tracks, structures, works, power houses upon private lands or rights of way and the same to acquire by purchase or contract or by the exercise of the right of eminent domain and condemnation.

The said company also desires the power to purchase, lease, acquire, build, construct, hold and operate electric plants and properties, hydro-electric plants and properties, steam plants and properties or other plants and properties for the generation, transmission and distribution of power and electric current, with the easements and franchises appertaining thereto, and to furnish power, electric current, light and heat for any purposes for which same may be employed.

The said company also desires the power to purchase, lease, build, construct, own, hold, maintain and operate steam heating and power plants and to furnish steam for heating and power plants and to furnish steam for heating and power purposes.

The said company desires the power to purchase, lease, acquire, own, hold and use the property necessary or convenient to the exercise of all powers that it may possess and that it shall have all the power in these respects [fol. 28] specified by the laws of the State of Georgia and particularly those with respect to street, interurban and suburban railroad companies, electric railroad companies

and companies creating electricity, together with the right to use and occupy the streets, roads, avenues and public places in the cities, towns and counties where it may operate or where any of its plants, works, railroads, lines, transmission li-es and systems or distributing lines and systems may be located, also the power to condemn property, rights and easements for the purpose of contracting and operating railways, works and lines, water power plants and properties, electric plants and properties, steam plants and properties, and erecting, constructing and maintaining the lines, pipes and systems for the transmission and distribution of electricity, light, heat and power and steam heat and steam power.

The capital stock of said company shall be twenty-seven million dollars, of which fifteen million dollars shall be common stock, two million dollars shall be six per cent cumulative first preferred stock and ten million dollars shall be four per cent non-cumulative second preferred stock.

The said first preferred stock is to be paid such six per cent dividends annually before any other stock receives any dividend. Deficiencies in preceding years to be made good out of profits in succeeding years before the other stock receives any dividend. It is to be paid no further dividend. On dissolution of said company it is to be paid its par value before other shares receive any payment. It will have no voting power and may be retired at any time in such manner as the company prescribes in issuing the same.

The second preferred stock shall be preferred over the common stock only to the extent of receiving four per cent [fol. 29] non-cumulative dividends annually before such common stock receives any dividend. Its preference ceases whenever it and the common stock have received as much as four per cent per annum for three consecutive years, when it becomes common stock. It shall participate with the common stock in all dividends above four per cent. After such per cent has been paid on both classes. It shall have like voting power, and rights in other respects with the common stock.

The said company desires the right, power and privilege to change the capital stock in the manner provided by law for changing the capital stock of railways.

The place where the principal office of the said company is to be located will be in the City of Atlanta, County of Fulton, State of Georgia, with the right and power to establish other offices, works, plants and properties, to own, maintain and operate the same at such other place or places within or without the State of Georgia as the said Company may from time to time desire.

The said company may at any time during its existence by a vote of a majority in amount of the voting capital stock then outstanding, wind up its business, dissolve and surrender its charter or any portion of its franchises.

Petitioners intend in good faith to go forward without delay to secure the necessary subscription to the capital stock to acquire or construct, equip, maintain and operate said railroad. They request to be incorporated under the laws of this State applicable to the incorporation of street and suburban railways, with all the powers specified in the Code of Georgia, providing for the incorporation of railroads, together with such additional powers as are conferred especially upon street and suburban railroads, electric railroad companies, water power companies and companies creating electricity. The company to be formed [fol. 30] shall have the right to apply for and accept by vote of a majority in amount of its voting capital stock at the time outstanding any additional powers or amendments to its charter, whether fundamental or immaterial, and whether conferred or to be acquired under general laws or special acts.

Petitioners have given four weeks' notice of their intention to apply for this charter by the publication of this petition in one of the newspapers in which the sheriffs advertisements are published in each of the counties through which the said proposed road will probably run, namely, the Counties of Fulton and DeKalb in the State of Georgia, once a week for four consecutive weeks before the filing of this petition.

Jack J. Spalding, Alex C. King, E. Marvin Underwood, Forrest Adair, G. W. Adair, Hughes Spalding, Charles Magee, J. M. McWhinney, R. Mathison, Geo. A. Kingston.

Witness: E. Y. B. Pennefather.
Witness: E. Y. B. Pennefather.

STATE of GEORGIA:

Office of Secretary of State, Atlanta, Ga.

To all to whom these presents may come, Greeting:

Whereas, in pursuance of an Act of the General Assembly of the State of Georgia, approved December 17th, 1892, and Acts amendatory thereof, Charles Magee of Toronto, Canada, John M. McWhinney, of Toronto, Canada, George A. Kingstone of Toronto, Canada, Robert Mathison, of Toronto, Canada, Jack J. Spalding of Fulton County, Georgia, Forrest Adair, of the City of Atlanta, [fol. 31] Georgia, Alex C. King, of the City of Atlanta, Georgia, E. Marvin Underwood of the City of Atlanta, Georgia, Hughes Spalding of Fulton County, Georgia, George W. Adair of the City of Atlanta, Georgia, having filed in the office of the Secretary of State a certain petition seeking the formation of a corporation, to be known as Georgia Railway & Power Company, with its principal office in the City of Atlanta, Fulton County, Georgia, with a capital stock of Twenty Seven Million ($27,000,000) Dollars, of which Fifteen Million ($15,000,000) Dollars shall be common stock, Two Million ($2,000,000) Dollars shall be six per cent (6%) cumulative first preferred stock; and Ten Million ($10,000,000) Dollars four (4%) per cent non-cumulative Second preferred stock, the rights and privileges of each class of stock being stated in said petition, for the purpose of constructing, purchasing, leasing, owning, equipping, maintaining and operating the Street, Suburban and Interburban Railroads, from the Town of Stone Mountain, to and through the Towns of Clarkston, Decatur, East Lake, Lakeview, Oakhurst, Kirkwood and Atlanta, all in DeKalb County, Georgia, and Atlanta, East Point, College Park and Hapeville, all in Fulton County, Georgia; and upon the streets, public roads, public places and private rights of way in said cities, towns and counties, with the right hereafter to extend its lines as provided by law, along the routes indicated in the petition for this certificate, a copy of which is hereto attached and made a part hereof; said corporation to be chartered for the term of one hundred and one (101) years, and to have, exercise and enjoy all the rights, powers and privileges in-

cident to corporations of such character under the laws of this State, especially the powers and privileges of transporting persons and property over its said street, suburban and interurban railroads. Also the power to purchase, lease, construct, own and operate electric plants and prop- [fol. 32] erties, hydro-electric plants and properties, steam and other plants and properties for generating electricity and steam heat and with the right to furnish power, light and heat to municipalities, corporations, companies and private citizens, as provided by the laws of Georgia in respect to electric street, suburban and interurban railroad companies and having complied with the statutes in such cases made and provided:

Therefore, the State of Georgia hereby grants unto the above named persons, their successors and assigns, full authority by and under the said name of Georgia Railway & Power Company to exercise the powers and privileges of a corporation for the purpose above stated, subject to the provisions of Article four (4) of the Constitution of this State and all the laws governing railroad companies of force at the date of this certificate or that may hereafter become of force either by constitutional or statute law, or by any rules and regulations of the Railroad Commission of this State, or otherwise which govern and control the operation of railroads in this State.

In witness whereof, these presents have been signed by the Secretary of State, and to which is annexed the Great Seal of the State at Atlanta, Georgia this 16th day of October, 1911.

Phillip Cook, Secretary of State.

(8) On the 1st of January, 1912, the Georgia Railway & Electric Company leased all its property and its different lines of railway to the Georgia Railway & Power Company under an indenture of lease, the material parts of which are as follows, to wit:

This indenture, made the 1st day of January in the year 1912, by and between the Georgia Railway and Electric Company, incorporated under the laws of the State of [fol. 33] Georgia (Hereinafter called the lessor), of the one part, and the Georgia Railway and Power Company, in-

corporated under the laws of the State of Georgia (hereinafter called the lessee), of the other part.

Whereas the lessor has been incorporated under the laws of the State of Georgia with corporate existence for one hundred and one years, expiring on the 28th day of January, 2003, and was duly organized for the purpose, among other things, of owning, maintaining, and operating electric railroads in and about the City of Atlanta in the said State, and now owns such an electric railroad, and is engaged in maintaining and operating the same, and the lessor has an authorized capital of $10,914,600, of which $2,400,000 is represented by $2,400,000 in par value of five per cent. non-cumulative preferred shares, and $8,514,600 is represented by $8,514,600 in par value of common shares, on which dividends have been currently paid at the rate of eight per cent. per annum in quarterly instalments, and the lessor now owns $514,600 in par value of its own common shares, which it acquired by purchase in the open market after the same had been duly issued;

And whereas, the lessor has executed a certain Refunding and Improvement Mortgage with the American Trust Company, as trustee, under date of 1st of January, 1909, for the purpose of securing a total authorized issue of $20,000,000 of its "Refunding and Improvement Mortgage Sinking Fund Gold Coupon Bonds," payable on 1st of January 1949, under which mortgage $7,520,000 of the said bonds were reserved for issue to provide or pay for additions, improvements and additional property as specified in Article 1, Section 10, thereof, and there have been issued under the said article 1, section 10, bonds to the amount of $769,000 of which $519,000 bonds are outstanding, and $250,000 are now in the treasury of the lessor;

[fol. 34] And whereas the said $514,600 of common shares and $250,000 of bonds 5 are available for sale or use for any of the corporate purposes of the lessor, and the residue of the bonds issuable under the said article 1, section 10, to wit $6,751,000 bonds, are issuable for future additions and property at a rate of not exceeding 75 per cent of the actual and fair cost thereof, as provided in the said mortgage:

And whereas the lessor also owns all of the capital stock, to wit $600,000 par value of preferred shares and $1,014,-

625 par value of common shares, of the Atlanta Gas Light Company, a corporation duly organized under the laws of the State of Georgia, with power among other things, to engage in the business of making and distributing gas for lighting and other purposes in the said City of Atlanta, and the said Atlanta Gas Light Company has executed a certain first mortgage with the New York Security and Trust Company (now the New York Trust Company) under date of 1st of June 1897, to secure a total authorized issue of $1,150,000 bonds, dated 1st of June, 1897, payable on the 1st of June, 1947, all of which are now outstanding:

And whereas the lessor also owns all of the capital stock, to wit $100,000 par value of common shares, of the Atlanta Northern Railway Company, a corporation duly organized under the laws of the State of Georgia, with power among other things to own, maintain and operate electric railroads, and the said Atlanta Northern Railway Company now owns an electric railroad running in and from the said City of Atlanta to the City of Marietta, and is engaged in maintaining and operating the said railroad, and the said Atlanta Northern Railway Company has executed a certain first mortgage or deed of trust with the Old Colony Trust Company as trustee, under date of 10th of October, 1904, to secure a total authorized issue of $400,000 bonds, [fol. 35] 1st July, 1904 payable 1st July, 1954, but redeemable on any interest date after 1st July, 1909, at 110, all of which bonds are now outstanding:

And whereas the lessor owns various other shares of other corporations, all of which are to be enumerated in the inventory provided for in Article 37 hereof:

And whereas the lessee has been organized under the laws of the State of Georgia for the purpose, among other things, of owning, maintaining and operating electric railroads and of generating electricity, and with power to take over the premises demised hereby:

And whereas both parties have full legal power and authority to enter into this indenture of lease and to make and fulfil all their respective covenants and agreements herein contained, and desire to do so for the purpose or connecting their respective railroads constructed and to be constructed and of obtaining motive power for the purpose of operating the same, and the execution hereof has been duly and

legally authorized by the shareholders and directors of both parties under the authority granted by the statutes of the State of Georgia,

Now therefore this Indenture witnesseth that the said parties each for itself, its successors and assigns, and each in consideration of the covenants and agreements herein made by the other, have covenanted and agreed, and do hereby covenant and agree, each with the other and its successors and assigns, as follows, to wit;

The lessor doth hereby grant, demise and lease unto the lessee all and singular its railroads, electric power and steam heating plants and systems, lands, franchises, contracts and other property of every description, real and personal now owned or hereafter to be acquired by the lessor, and all its franchises, rights, privileges, easements, permits, licenses and appurtenances thereunto belonging or [fol. 36] otherwise, including the right to demand and receive to the lessee's own use all tolls, rents, revenues, income and profits, but excepting its corporate seal and books of record and account, and its deeds, grants, plats and other instruments and documents containing or constituting the evidence of its rights and title to the property now or hereafter owned or operated by it; and excepting the shares of stock and bonds of other corporation- now or hereafter owned by the lessor, but including all the income derived or receivable from such shares and bonds (all of which are hereinafter referred to as the demised premises).

Provided always that this lease be subject to the several mortgages now existing upon all or any part of the demised premises.

To Have and to Hold the same unto the lessee, its successors and assigns, for the term of 999 years from the 1st of January, 1912.

Lessor's Covenants

1. The lessor covenants that during the continuance of this lease, so far as it lawfully may, it will maintain its corporate organization, and for that purpose will hold all necessary meetings, elect all necessary directors and officers at the expense of the lessee, but not exceeding $5,000 per annum, and will at the request and expense of the lessee make and keep all necessary records, reports, and returns

required by law, and exercise or cause to be exercised all such franchises, and do and perform or cause to be done or performed all such acts, lawful and consistent with its rights hereunder, as shall be proper and necessary for the due protection, preservation and full enjoyment by the lessee of all the demised premises, and the property extension or renewal from time to time of such rights and franchises, and to carry out the true intent and meaning of this instru-
[fol. 37] ment. The lessor covenants that, at the request and expense of the lessee and in due season, it will do all things and cause all things to be done by its shareholders and directors that lawfully can be done to continue, renew and extend its corporate existence from time to time until a time subsequent to the expiration of nine hundred and ninety-nine years from the date hereof.

2. The lessor covenants that the lessee may use the name of the lessor in bringing, prosecuting or defending any suits or proceedings in law or equity which may be necessary or proper, in the opinion of the lessee, for the protection, preservation and full enjoyment by the lessee of all the demised premises, including proceedings for condemnation and the exercise of the right of eminent domain, and may from time to time apply for the acquire in the name or in the right of the lessor further rights to lay and maintain tracks and conduits and to erect and maintain poles, pole lines, piping and wires for said street suburban and interurban railroads, electric light and power and steam heating plants and systems, but the lessee shall save and hold the lessor harmless and indemnified from and against all loss, cost, damage and expense whatsoever arising therefrom.

15. The lessor covenants that it will deliver to the lessee as of the date hereof the sole and exclusive possession of all the demised premises, and also turn over to the lessee for the sole use of the lessee all the cash, bills notes and accounts receivable, and other quick assets belonging to the lessor, except shares of stock and bonds), as well as all supplies, equipment, appliances and other personal property embraced in the demised premises, and that from time to time during the continuance of this lease, as other
[fol. 38] property covered thereby is acquired and come into possession of the lessor, it will transfer and deliver

possession thereof to the lessee; it being agreed by the lessee that the said cash and quick assets are more than sufficient to recompense it for all sums which the lessee is obliged to pay hereunder on account of dividends, taxes, rentals, interest and sinking fund charges of the lessor accrued prior to the date hereof, and of the current debts and liabilities of the lessor.

Lessee's Covenants

16. The lessee covenants that it will pay, satisfy and discharge as the same shall become due and payable all taxes, rates, charges, licenses and assessments, general and special, ordinary and extraordinary, of every nature and description which have been or may be lawfully imposed or assessed during the continuance of this lease in any way upon the lessor or upon the lessee, either with reference to the capital stock or income of the lessor, or to the property, earnings, contracts, rights, privileges or franchises hereby demised, or to the sums of money payable by the lessee hereunder to the shareholders of the lessor or otherwise; and also that it will pay all sums of money which the lessor now may be or hereafter become liable to pay by law, contract or otherwise, for the possession enjoyment or perpetuation of any of its rights, powers, privileges or franchises; said payments to be made as the same become due to the officers or other persons entitled by law to recover the same; and, in the event that the lessee shall fail to make any such payments when the same become due, the lessor may at any time thereafter make such payments and recover the amount thereof with interest thereon from the date of such payments and all costs, attorneys' fees and other expenses from the lessee, without prejudice to any rights secured to the lessor by this lease for breach of any covenants hereof; it being understood and agreed, however, [fol. 39] that, if the lessee shall desire to resist by legal proceedings the payment of any tax or assessment, and shall so notify the lessor and the lessee shall commerce such legal proceedings in good faith, the lessor shall not pay nor shall the lessee be obliged to pay any such tax or assessment until 30 days after the final adjudication thereupon by the court having jurisdiction in such case, and, in the event that the lessee shall take an appeal from any adjudication upon

such tax or assessment, then the lessor shall not pay nor shall the lessee be obliged to pay such tax or assessment until 30 days after final adjudication upon such appeal.

17. The lessee hereby accepts the street suburban and interurban railroads, electric power and steam heating plants and systems and the estate and property, real and personal, hereby demised as the same actually are at the date hereof, and covenants that it will, subject to the provisions of existing and future municipal grants, during the term hereof renew, repair and replace the same, so as to maintain and keep the demised premises in as good order, repair and condition as the same are now and in their present state of efficiency; and that without the consent of the lessor, it will not sell or transfer (except by mortgage or pledge to secure its debts), its power plants, transmission lines or sub-stations, or substantial rights used or useful for or in connection with the creation, generation, transmission or use of power, unless other power plants, transmission lines or sub-stations of equal or greater capacity and usefulness shall be substituted therefor or unless it shall retain the ownership of hydro-electric plants, water-power properties, transmission lines and rights reasonably sufficient to supply all the electric current which can be used or supplied in the territory in which the business of the lessor is or may be [fol. 40] reasonably expected to be conducted, provided that nothing in this paragraph contained shall be constructed to prohibit or prevent an assignment of this lease or the sale of the lessee's properties upon the terms and conditions provided in paragraph 42 hereof; that it will from time to time at its own expense (except so far as the expense thereof may be paid or reimbursed out of stock and bonds of the lessor or otherwise as herein provided) make all extensions, additions, alterations, improvements, renewals and betterments which may be necessary or proper with reference to the demised premises and for the use and operation thereof, and will do and perform all other things necessary to make and maintain said street suburban and interurban railroads, plants and systems as first class, modern and efficient street suburban and interurban railroads, electric power and steam heating plants and systems of capacity sufficient to supply the reasonable demands of the

public within the area prescribed below in this paragraph; and that it will apply for and obtain, so far as it can so do, all renewals of franchises, municipal grants and privileges and all new franchises, grants and privileges that may be necessary for the maintenance and operation of the leased premises and the business of the lessor; and that all lands, structures, improvements, betterments and renewals added to or made upon the demised premises, and all other property of every kind acquired within a distance of seven miles in any direction from the south-west corner of Central Avenue and Wall Street in the City of Atlanta, Georgia, (except power transmission lines, sub-stations and office buildings of the lessee), and all rights, privileges and franchises acquired in connection with or incident or appurtenant to or used or useful or convenient in respect of or in connection with the demised premises or such property [fol. 41] within the said prescribed area, shall be acquired in the name of the lessor, and shall become the property of the lessor and be treated as part of the demised premises and be subject to all the terms, conditions and provisions of this indenture in like manner as if they had been vested in the lessor at the date of this instrument.

21. The lessee covenants that it will insure and keep insured such parts of the leased premises as are of an insurable nature for such sums and in such manner as shall reasonably protect the same against loss or damage by fire and as shall be usual in like properties, and that it will exhibit to the lessor or its agents the policies, whenever reasonably requested, and will apply all sums received by virtue of any such insurance to the rebuilding, replacement or repair of the property damaged or destroyed, whenever necessary or desirable in the judgment of the lessee for the operations of the leased property, or, when not so necessary or desirable, then to extensions, betterments and renewals of the leased property; provided, however, that the lessee may adopt such other plan or method of protection against loss by fire, whether by the establishment of an insurance fund or otherwise, as may be approved by the board of directors of the lessor. It is understood and agreed, however, that the lessee will at all times comply with the insurance clause contained in all mortgages upon the demised premises. In case of any failure on the part of the lessee to keep said property so insured or protected from

loss by fire, it shall be lawful for the lessor to cause said property to be insured, and the lessor may recover the amount of any payments of premiums for such insurance, with interest thereon from the date thereof, from the lessee, without prejudice to any rights secured to the lessor by this lease for breach of any covenant thereof.

[fol. 42] 23. The lessee hereby assumes all the contracts and other obligations of the lessor and covenants that it will pay all the indebtedness of the lessor shown by its books and records, and also covenants that it will assume and pay all other debts, obligations and liabilities, both present and future, of the lessor (except the principal of bonds and except any liabilities incurred by the lessor contrary to its covenants herein contained, but including all obligations to pay and provide sinking funds), and all the liabilities of the lessor or injuries or damages to persons or property, and that it will defend, at its own expense, all actions now pending or hereafter brought against the lessor on account of claims for such liabilities, the lessee to be subrogated, however, to the benefit of any contract or undertaking with any person or persons indemnifying or protecting the lessor against such indebtedness and liabilities; and also that it will pay all the interest and sinking fund charges on all bonds of the Atlanta Gas Light Company and of the Atlanta Northern Railway Company, now outstanding or that may hereafter be issued with the consent of the lessee.

24. The lessee covenants that at its own cost and expense it will operate said street suburban and interurban railroads, electric power and steam heating plants and systems and the other leased properties in compliance with the laws of the State of Georgia, and that it will make all returns and do all things that may by law be required in respect of the whole or any part of the demised premises or the business conducted therewith, and that it will furnish all cars, equipment and apparatus of every description necessary for the proper use and operation of said street suburban and interurban railroads and other leased property but, if at any time hereafter the lessee shall find it undesirable or unprofitable to maintain and operate the [fol. 43] steam heating plant of the lessor, it may discontinue the operation and use of the same, subject to any

mortgage obligations of the lessor relating thereto and to the obligations of the municipal grants to the lessor.

26. The lessee further covenants that it will perform all the obligations imposed upon the lessor by law or by the provisions of its grants from or contract with any State, city, town or county, in relation to the demised premises, and not do or suffer to be done or omitted any act or thing which shall be ground for forfeiture of any of the franchises, rights and privileges or easements derived thereunder for the construction and maintenance and operation of said street suburban and interurban railroads, electric power and steam heating plants and systems, or any part thereof, of which the lessee shall at any time be in possession under this lease, or which shall be a breach of any condition or obligation imposed upon the lessor by the mortgages of the lessor, or by any other contract entered into by the lessor; and that the lessee will not suffer, permit or consent to any alterations or changes in any such franchises, rights or privileges without the writen consent of the lessor; and said lessee shall and will hold the lessor harmless from all liability, cost or expense arising during the term hereby created for or upon the bonds, if any, heretofore or hereafter executed to any city, town or county conditioned for the faithful performance of the obligations of the lessor under its grant from or contract with any such city, town or county.

28. The lessee covenants that it will perform and observe all the covenants and agreements of the lessor, including all covenants and agreements with respect to sinking funds, but excepting those as to the payment of principal of bonds so far as the sinking funds are sufficient to pay the same, [fol. 44] contained in its said mortgage to the American Trust Company of Boston, as trustee, dated the first day of January, 1909, securing a total authorized issue of bonds in the sum of $20,000,000; and also all covenants and agreements of the lessor except those as to the payment of the principal of bonds, contained in any mortgage executed pursuant to the provisions hereof.

(9) In February 1927, by virtue of certificate issue by the Secretary of the State of Georgia the following corporations, to wit; Georgia Railway & Electric Company,

Georgia Railway & Power Company, Athens Railway & Electric Company, East Georgia Power Company and the Rome Railway & Light Company were merged and consolidated into a corporation under the name and style of the Georgia Power Company.

(10) An ordinance of the City of Decatur passed May 15, 1925, as follows, to wit:

An Ordinance Providing for Paving of Oak Street and East Ponce De Leon Ave.

Whereas, the Commissioners of the City of Decatur, by virtue of the authority granted them under the charter of said City, have full power and authority, in their discretion, to grade, pave, macadamize, or otherwise improve the travel and drainage of the streets, squares, public lanes and alleys of said city; and

Whereas, it is necessary for the public travel and drainage of said streets that the same should be improved; and

Whereas, it is the judgment of the Commissioners of said City, and by this ordinance they so declare, that the pavement of said streets with 5" Asphaltic Concrete and with granite cubes between the tracks of the street car company and for two (2) feet on each side thereof, and that the granite cubes and ties of the car track be firmly set in a concrete base and the cubes grouted with asphaltic [fol. 45] or cement, accordingly to the specifications and plans of the City Engineer, will properly improve said street for the travel and drainage thereof, and that such improvements are necessary for such travel and drainage; and

Whereas, the Commissioners of the said City as authorized, under the charter of said City, to assess the cost, in full, for the paving between the tracks and for two (2) feet on each side thereof of the Street Railway Company, and to assess the remaining cost of said paving against the real estate abutting on such street; one-half of such remaining cost to be assessed against the real estate abutting on one side of the street and one-half of said remaining cost to be assessed against the real estate abutting on the other side of said street, where paved.

Therefore be it ordained by the Commissioners of the City of Decatur and it is hereby ordained by authority of

the same, that N. Oak St. from E. Howard Ave. to E. Ponce De Leon Ave. and E. Ponce De Leon Ave. from E. Court Square to Sycamore Drive be improved by paving the same with 5" Asphaltic Concrete and with granite cubes between the tracks of the Street Railway Company, and for two (2) feet on each side thereof, and that the granite cubes and ties of the car track be firmly set in a concrete base and the cubes grouted with asphalt or cement.

Be it further ordained, that when said street has been so improved, the City Manager of said city, shall make up an assessment roll of the cost of such improvement, showing the total cost thereof and showing the total cost between the tracks of said Railway Company and for two (2) feet on each side thereof, and showing the remaining cost of such improvement; that is, the cost after deducting from the total cost the cost of paving between said car tracks and for two (2) feet on each side thereof, and showing the num-
[fol. 46] ber of feet of real estate abutting on each side of said streets where paved, and the cost per lineal foot on each side of said streets where paved, as provided by the charter of said city.

Be it further ordained, when the City Manager shall furnish to the Commissioners such assessment roll, they shall adopt an ordinance making an assessment against the Georgia Railway & Power Company for the total cost of the pavement between the tracks of said Company and for two (2) feet on each side thereof; against the real estate abutting on each side of said streets, and against the owners thereof at the time of making said assessment and such remaining cost.

Be it further ordained, that such assessment shall be a lien against said Street Railway Company and against said property from the time of making said assessment, in terms of the charter of said City.

Be it further ordained, that upon adoption of said ordinance making said assessment, the Clerk of the Commissioners shall notify the respective owners of such property, and the Georgia Railway & Power Company, the amount of assessment against their said properties, and he shall give them ten (10) days in which to make payment thereof and after ten (10) days, he shall issue fi. fas. against the property, and the said owners thereof and against the Georgia Railway & Power Company for all assessments

which may be in default as provided by the charter of said city, which fi. fas. shall be turned over to the Marshall of said City for levy and sale, if not paid.

Be it further ordained, that said Clerk shall publish notices of the introduction of this ordinance notifying the public and parties interested by publication in the De Kalb New Era, one time, at least ten (10) days before the adoption of this ordinance, and such notice shall contain a statement of the streets to be improved; the kind of pavement [fol. 47] to be made; the date of the meeting of the Commissioners at which such ordinance will be considered for adoption, and the same may be adopted at such meeting or some subsequent meeting, in the discretion of the Commissioners, and any person interested in such improvement may file his objection to the adoption of such ordinance with the City Clerk and be heard by said Commissioners, if he may desire to appear and be heard.

Be it further ordained, that all ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed.

(11) A letter of July 9th, 1925 from Mr. P. S. Arkwright, President of the Georgia Railway & Power Company to J. S. Looney, City Manager of the Town of Decatur, as follows to wit:

"Dear Mr. Looney: On my return to the City Mr. Butler brought to my attention your notice with reference to the paving of Ponce de Leon Avenue from Oak Street in the City of Decatur.

This Company can neither do this paving itself nor pay for it should the City of Decatur do it. The particular line is being operated at a very considerable loss and has been sustaining such loss over a long period, and the prospects are that it will continue to be operated at a loss as long as it is operated at all.

This additional paving burden which, if enforced against us, would involve us in an expense of from $21,000 to $25,000, is more than the line can bear. Under these circumstances, we would be willing to surrender to the City of Decatur the franchise for this line and remove these tracks from the streets. To this end I have written Mr. L. J. Steele, City Attorney, a letter, copy of which is enclosed.

[fol. 48] I respectfully request that some way be found not to enforce this paving charge against us, as of course we would rather not surrender the franchise if it can be avoided.

Yours very truly, P. S. Arkwright, President.

(12) A letter of July 9th, 1925 from P. S. Arkwright, President of the Georgia Railway & Power Company to L. J. Steele, City Attorney of the Town of Decatur, as follows, to wit:

"Dear Mr. Steele: Your letter of July 7th, with reference to paving Oak Street from the Georgia Railroad to Ponce de Leon Avenue, and paving Ponce de Leon Avenue from the courthouse east, has been received.

In order to meet the cost of this paving and the track reconstruction incidental thereto, it would be necessary for this company to pay from $21,000 to $25,000, dependent on the plan adopted for the work.

This street railroad line is now, and has been for a long time past, operated at a very great loss. Under existing conditions it is impossible to make this line pay the cost of operation. As an inevitable result of this condition the line cannot bear the burden of this paving cost.

If the City of Decatur insists upon this paving we would prefer to surrender the franchise for this line rather than be subjected to the expense. I would appreciate it if you would please take it up with the City of Decatur and let met know what their views on the subject may be. In the event they would prefer to have this franchise surrendered I will call a meeting of the Board of Directors of the Company and I am sure they will unanimously and immediately pass the necessary resolutions authorizing the surrender of the franchise.

[fol. 49] Naturally we do not want to do this, but we can't pay for the paving and we would rather surrender the franchise than have this additional burden placed upon us under present conditions.

Yours truly, P. S. Arkwright, President."

(13) Also letter of July 16th, 1925 from Mr. P. S. Arkwright, President of the Georgia Railway & Power Company, to L. J. Steele, City Attorney of the Town of Decatur, as follows, to wit:

"July 16, 1925.

L. J. Steele, Esq., City Attorney, Decatur, Ga.

DEAR MR. STEELE: It is a little more than I think the people of Decatur ought to expect of us—to furnish electric railway service at a grossly inadequate fare and then to have to pave the streets of the town besides. This is certainly not a good thing for us and in the long run I don't think it is a good thing for Decatur. In any event, we can only do what we are able to do and this depends exclusively on the earnings of the street railway. The street railway system as a whole is not earning its way even at the fare of 7 cents allowed in Atlanta. The fare of 5 cents insisted upon by the Town of Decatur is rapidly confiscating the property and runs the losses of the line to Decatur up to such an amount that there is nothing left with which to pay for street paving. In any event, this company cannot pay for the paving in Decatur, nor can it rebuild or recondition its tracks in connection with the paving.

Under the circumstances if the City of Decatur insists on paving streets and assessing this company for it I repeat in all earnestness my suggestion that we surrender [fol. 50] the franchises of the street railway in Decatur. If, however, the City of Decatur refuses to accept this then I don't know what can be done. Certainly we cannot pave the streets, nor pay paving assessment for paving the streets, nor can we do any work on the track in connection with the paving.

Yours very truly, P. S. Arkwright, President."

(14) On an application of the Georgia Railway & Power Company to increase street car fares on various lines, the Railroad Commission of the State of Georgia on September 22nd, 1920, fixed street railway fares over various lines at 7 cents per passenger. In this order of said date the commission held:

"Prior to April 14, 1919, applicant had in effect on its City and suburban lines, five cent fares with free transfers. Effective August 14, 1919, a maximum fare of six cents was authorized where a five cents fare was then charged, except as to fares between Atlanta and Decatur on the main Decatur line and between Atlanta and College Park on the

College Park Line fixed by contracts between the Company and the Towns of Decatur and College Park, held by the Supreme Court of Georgia to be valid:

Patrons on these two lines intermediate between Atlanta and Decatur and College Park pay six cents fares. * * *

The five cent fares now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not fairly compensatory, and as to the patrons of the company on other routes, and on intermediate territory on these routes, are discriminatory. The Commission is without power to increase them. * * * increased facilities are required on the main De-
[fol. 51] catur and College Park routes, which will result in improved service. * * * As to the Main Decatur and College Park routes, on which trailers shall be used on all schedules operated during rush hours."

(15) Notice to the City of Decatur with reference to discontinuance of service by Georgia Railway & Power Company and Georgia Railway & Electric Company together with copy of resolutions duly passed by said companies, as follows, to wit:

"September 26, 1925.

To the Hon. Mayor and Commissioners, City of Decatur, Ga.

DEAR SIRS: Enclosed is a formal surrender by Georgia Railway & Electric Company, owner, and Georgia Railway & Power Company, Lessee, of the franchises or permits for the construction and operation of the electric railway within the city limits of Decatur, extending along North Railroad Avenue, Oak Street, Broad Street, East Court Square, South Court Square, and McDonough Street.

We desire to give notice in advance of the discontinuance of the operation of this electric railway line so as not to discommode the patrons of the line any more than is necessary.

Accordingly, you are notified that we will discontinue operation of this electric railway line at the end of the regular schedules on September 20th, 1925.

You are now engaged in paving some of the streets on which this line has been constructed. We suggest the advisability of suspending the paving operation until the track

is taken up as, of course, it will be necessary to disturb the paving in order to remove the track.

In this connection, we would like also to protest against the work you are doing on this track. We have already [fol. 52] protested against the paving. We call your attention also to the fact that you are improperly replacing this track and due to the manner in which you are having this work performed both the track and the paving will very soon go to pieces should cars be operated over it.

While we have placed October 1st as the date when operations will be discontinued, still if you are unwilling for the cars to continue operating until this date please let us know and we will discontinue immediately.

Yours very truly, P. S. Arkwright, President."

September 26, 1925.

To the Hon. Mayor and Commissioners, City of Decatur, Ga.

DEAR SIRS: On or about September 4, 1899, the Town of Decatur granted the Collins Park and Belt Railroad Company permission or franchise to build and operate an electric street railroad in the Town of Decatur from the western town limits on North Railroad Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, thence along East Court Square to South Court Square, thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, which permit or franchise was transferred subsequently to Georgia Railway & Electric Company. Also, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about March 3, 1903, the said permit or franchise was amended and an additional permit granted to double track a part of said route.

Under the said permits or franchises the said electric railway line has been constructed and operated and is now being operated in the City of Decatur, Georgia, and the same, with its permits and franchises has been leased to Georgia Railway & Power Company for a term of years.

[fol. 53] The said line of electric railway in the City of Decatur is operated at a loss and the revenues derived therefrom do not yield the cost of operating the same or earn enough to pay the taxes on account of the same. Be-

cause the rate of fares which may be charged on the said line of electric railway is unalterably fixed and rightly limited to a sum less than the cost of furnishing such service, it is impossible ever to earn on such electric railway the cost of its operation, and such operation cannot be continued except at a certain and continuing loss.

Consequently, Georgia Railway & Electric Company, as the owner of said permits and franchises, and Georgia Railway & Power Company, as the Lessee thereof, concurring herein, hereby formally surrender the said permits and franchises granted by the Town and City of Decatur for the construction and operation of the said electric railway hereinbefore referred to.

Attached hereto are certified copies of resolutions adopted by the Board of Directors of Georgia Railway & Electric Company and Georgia Railway & Power Company, authorizing the surrender of such franchises.

Yours very truly, Georgia Railway and Electric Company, by John C. Hollman, Vice President. Georgia Railway and Power Company, by P. S. Arkwright, President."

"The resolutions adopted by the Board of Directors of Georgia Railway & Electric Company with reference to authorizing the surrender of the street railway franchise and permit therein described from the Town of Decatur, were submitted to and read to the meeting.

[fol. 54] Whereupon the following resolution was offered and unanimously adopted, to wit:

Whereas, by the consent and with the concurrence of this company, Georgia Railway and Electric Company, by action of its Board of Directors, has this day authorized the surrender to the Town of Decatur of the permit or franchise to construct and operate an electric street railroad in the Town of Decatur from the western town limits on North Railroad Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, thence along East Court Square to South Court Square, thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, and

Whereas, on or about March 18, 1912, the said line of electric railway, with the said permit or franchise, was leased to this company for a term of years, and

Whereas, the said electric railway is operated at a loss and its revenues do not yield sufficient to pay the actual cost of operation and the rates of fare thereon are unalterably fixed and rigidly limited to a sum so low that it is impossible for said electric railway ever to pay the actual cost of operation;

Therefore be it resolved by the Board of Directors of Georgia Railway and Power Company that it assents to and concurs in the resolution adopted by the Board of Directors of Georgia Railway and Electric Company authorizing the surrender of the said franchise to the City of Decatur, and the officers of this company are hereby authorized to join in such surrender on behalf of this company and to discontinue operation of the said electric railway line and to take up and remove the track and other structures built under the said permits and franchises.

Be it further resolved that in the event such surrender is made it shall not in any way or manner affect the obligations [fol. 55] of this company under the said lease, but the said lease shall remain in full force and effect, except as to the said railway track in the City of Decatur and the franchise therefor.

Be it further resolved that the officers of this Company be and they are hereby authorized and directed to do and perform any and all of the acts and enter into and execute any and all instruments or writings necessary or proper in their judgment to carry this resolution into effect.

I, W. H. Wright, Secretary of Georgia Railway and Power Company, do hereby certify that the foregoing is a true and correct copy of resolution adopted at a special meeting of the Board of Directors of said Company duly and regularly called and held in accordance with law and the by-laws of the Company at Atlanta, Georgia, August 14, 1925, which meeting was duly constituted by the presence of a quorum, and that said resolution has not since been altered, repealed or amended, but is of full force and effect.

Witness my hand and the seal of said Company this September 23, 1925.

W. H. Wright, Secretary.

Whereas, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about September 4, 1899, a permit or franchise was granted to the Collins Park and Belt Railroad Company to build, electrically equip and operate an electric street railroad in the Town of Decatur from the western town limits on North Railroad Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, thence along East Court Square to South Court Square, thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, the name of said Collins Park and Belt Railroad Company having been subsequently changed to Atlanta Rapid Transit [fol. 56] Company, and

Whereas, said Atlanta Rapid Transit Company, on or about March 28, 1902, transferred and conveyed the said permit or franchise, together with the electric railway built thereunder, to Georgia Railway & Electric Company and,

Whereas, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about March 3, 1903, the said permit or franchise was amended and an additional permit granted to double track a part of said route, and

Whereas, on or about March 18, 1912, the said line of electric railway, with the said permit or franchise, was leased to the Georgia Railway and Power Company for a term of years, and

Whereas, the said electric railway is operated at a loss and its revenues do not yield sufficient to pay the actual cost of operation and the rates of fare thereon are unalterably fixed and rigidly limited to a sum so low that it — impossible for said electric railway ever to pay the actual cost of operation

Now, therefore, be it resolved by the Board of Directors of Georgia Railway and Electric Company (Georgia Railway and Power Company, Lessee, concurring herein) that the officers of this company are hereby authorized and empowered to surrender the franchise and permit hereinbefore described in the preambles to this resolution, granted by the Town of Decatur to Collins Park and Belt Railroad Company and the Georgia Railway and Electric Company, and to discontinue operation of the said electric railway

and to take up and remove the track and other structures built under the said permits and franchises.

Be it further resolved that in the event such surrender is made Georgia Railway and Power, Lessee, be and it is hereby released, relieved and absolved from continuing to [fol. 57] operate said line of electric railway or maintaining or preserving the said permits and franchises, such act in no way or manner to affect the obligations of Georgia Railway and Power Company under the said lease, but the same to remain in full force and effect except as to the said railway track in the Town of Decatur and the franchise therefore hereinbefore described.

Be it further resolved that the officers of this company be and they are hereby authorized to do and perform any and all acts and enter into and execute any and all instruments or writings necessary or proper in their judgment to carry this resolution into effect.

I, W. H. Wright, Secretary of Georgia Railway and Electric Company, do hereby certify that the foregoing is a true and correct copy of resolution adopted at a special meeting of the Board of Directors of said Company duly and regularly called and held in accordance with law and the by-laws of the Company at Atlanta, Georgia, August 14, 1926, which meeting was duly constituted by the presence of a quorum and that said resolution has not since been altered, repealed or amended, but is of full force and effect.

Witness my hand and the seal of said Company this September 23, 1925.

W. H. Wright.

(16) General Order No. 14 of the Railroad Commission of Georgia as follows, to wit:

"All rates now in effect or which may hereafter become effective, which are no higher than the maximum rates prescribed by this Commission whether such rates are the result of voluntary action upon the part of any company, corporation or person, subject to the jurisdiction of this Commission or otherwise, are hereby established as the rates of the Railroad Commission of Georgia, and no such [fol. 58] rates shall be discontinued nor raised without the

consent of the Railroad Commission first being obtained, but all such rates shall continue in force without hindrance, the same as other rates prescribed by the Commission, and any and all facilities, privileges or service, now in effect or practiced, or hereafter made effective, extended, or practiced, which give, grant, extend or allow patrons, shippers or other persons transacting business with said companies, corporation or other persons as much or more of the privileges, facilities or service to which they are entitled by law or by any rule, regulation or order of this commission, whether such privileges, facilities or service are given, granted, extended or allowed as the result of voluntary action upon the part of such companies, corporations or persons, or otherwise, are hereby established as the requirements of the Railroad Commission of Georgia, and no such privileges, facilities or service shall be discontinued without the consent of the Railroad Commission first being obtained, but all such privileges, facilities or service shall be given, granted, extended or allowed without hindrance, the same as other requirements of this Commission; provided that nothing herein contained shall operate as repealing in any way the provisions of Passenger Rule No. 7.

By order of Board.

H. W. Hill, Chairman. Campbell Wallace, Secretary.

(17) Ordinance of the Town of Decatur refusing the surrender of the franchise of the Georgia Railway & Electric Company and the Georgia Railway & Power Company, to wit:

"Whereas, The Commissioners of the City of Decatur, on the 28th day of September, 1925, received from John C. Hallman, Vice President of Georgia Railway & Electric Company, and P. S. Arkwright, President of Georgia Rail- [fol. 59] way & Power Company, notice that the Companies tendered to City of Decatur a surrender of the franchise granted by the Town of Decatur to Collins Park & Belt Railroad Company, September 4, 1899, and also the amendment thereto granted by ordinance on the 3rd day of March 1903; and

Whereas, it is not to the interest of the City of Decatur, at this time, to accept the surrender of said franchises.

Therefore, be it resolved by the Commissioners of City of Decatur, that the tender made by John C. Hallman, Vice President of Georgia Railway & Electric Company, and P. S. Arkwright, President of Georgia Railway & Power Company, of a surrender of the above stated franchise, and the amendment thereto, be not accepted, and the same is not accepted.

This September 28, 1925."

(18) The Georgia Public Service Commission (formerly the Railroad Commission of the State of Georgia) by order effective August 14, 1919, fixed street railway fares of the Georgia Railway & Power Company (and Georgia Railway & Electric Company), under its jurisdiction, at 6 cents per ride per passenger and subsequently trereto on September 22nd, 1920 increased street railway fares of said defendants, under its jurisdiction, to 7 cents per ride per passenger. Subsequently thereto, by an order of the Railroad Commission of December 15, 1927 said Commission increased the street railway fares of said defendant, under its jurisdiction, to 10 cents per ride per passenger with the right of purchasing four (4) tickets for thirty cents (30), (the ticket fares being at the rate of 7½ cents per ride per passenger where four tickets are purchased at one time).

(19) Prior to the year 1902 and during a period of more than thirty years various lines of street cars have been constructed in Atlanta by different corporations, some of them being chartered for horse cars and some for trolley lines. [fol. 60] One of the various lines thus built was an interurban line running from a point near the center of Atlanta eastward to the Town of Decatur in DeKalb County, following generally the course of the Georgia Railroad, but some distance south of it which is still in operation and is referred to and designated as the South Decatur line. This was originally built as a dummy steam engine route, but has long been electrified. Another trolley line running eastward from a point near the center of Atlanta eastward to Decatur some distance north of the Georgia Railroad. The permit from the Town of Decatur to build this line was as follows, to wit:

"July 20, 1892.

To the Mayor and Council of Decatur, Ga.:

The petition of W. I. Zachry, J. R. Mell and A. S. Seals shows that they are forming a company to build, equip, and operate an electric railroad from Atlanta eastward to Decatur, and that they desire for themselves, associates and assigns, the absolute franchise right to build and run said railroad along and over the following streets in Decatur; from city limits along Green Street to Broad Street, along Broad to a point opposite Oak, along Oak to North Avenue, along North Avenue to Depot Street, along Depot Street to McDonough Street, along McDonough Street to South Court Square, along South Court Square to West Court Square, along West Court quare to Green Street.

Petitioners ask that they be allowed six months or other reasonable time in which to begin work, and six months additional in which, to have said road running.

Clyde Brooks, Petitioners' Attorney.

The above petition was approved and granted with the following exception:

[fol. 61] The time for the commencement of work on said road was required to be three months and to be completed in fifteen months.

Said road to be exempt from taxation for the term of twenty years.

The Petition and amendments was then read and approved in open council."

This is the line which was subsequently discontinued by which will hereafter in this statement of facts be referred to as the North Decatur line. A third was the trolley line of the Collins Park and Belt Railroad Company running westward from a point near the center of Atlanta to the Village of Bolton some six or seven miles away. The Collins Park & Belt Railroad Company as set out in paragraph 3 of the statement of facts, built what is known as the Central Decatur line.

About the year 1890 there was organized and incorporated a company known as the Atlanta Consolidated Street Railway Company which acquired all the street car lines in and around Atlanta existing at that time, the North Decatur line being subsequently acquired by deed in 1900.

The Collins Park & Belt Railroad Company was not in existence in 1890 and was never acquired by the Consolidated Company. After that time the Consolidated Company operated its trolley lines under one management all the lines in and around Atlanta except the Collins Park & Belt Railroad Company lines and except the Atlanta Railway Company or the North Decatur line.

Subsequently after the Collins Park & Belt Railroad Company acquired all the properties of the Atlanta Rapid Transit Company it built several other lines in Atlanta and operated them.

In January 1902 the Georgia Railway & Electric Company was organized.

[fol. 62] In March 1902 the Georgia Railway & Electric Company acquired all the properties of the Atlanta Rapid Transit Company. After said date no other street car lines have been owned or operated in or from Atlanta by any other concern, except two interurban lines, one of which, the Atlanta Northern line to Marietta is a separate corporation, all of which stock is owned by the Georgia Railway & Electric Company, and the other the Stone Mountain line built and operated by the Georgia Railway & Power Company. The line in Decatur built by the Collins Park & Belt Railroad Company, which is the subject of the present litigation, was built in 1899 as authorized by permit of the Decatur City Government heretofore set out.

In 1902 the Georgia Railway & Electric Company operated two lines north of the Georgia Railroad, one which has been designated as the North Decatur Line and the other designated as Central Decatur line. Each of said lines were built and operated under separate permits from Atlanta, Kirkwood, DeKalb County and Decatur. Each of said lines include a loop through the town eastward from the court house and the two loops were practically parallel for a total distance of approximately one mile and in many cases on the same street.

In December 1902, the Georgia Railway & Electric Company began tearing up the North Decatur line within the town limits of Decatur for the purpose of abandoning its use from a point about half way between Decatur and Atlanta. The town government filed its equitable petition — prevent this action and the litigation was settled by com-

promise dated April 1, 1903 based on the City Ordinance and the Resolution of the Company's Director's as shown in Exhibit B of the petition. Thereafter the North Decatur line was taken up by the Electric Company and abandoned in the Town of Decatur and for a distance of two or three miles west thereof.

[fol. 63] In October, 1911, there was organized and incorporated a company known as the Georgia Railway & Power Company.

On January 12, 1912, a contract of lease was entered into between the Electric Company and the Power Company. The properties were delivered March 12, 1912 in accordance with this lease. In February, 1927, the Georgia Railway & Electric Company and the Georgia Railway & Power Company and other companies heretofore named were consolidated and merged into what is known as the Georgia Power Company.

Paving fi. fas. issued by the City of Decatur covering costs of paving East Ponce De Leon Ave. and issued against the Georgia Railway & Power Company, said fi. fas being for the amount of to wit; $14,387.29; showing the levy of said fi. fas. upon property other then the street railway property along or adjacent to the street paved, also showing that the levy was made upon property entirely disconnected from the street improved or paved for which the fi. fas. were issued.

By agreement of the parties, approved by the Judge, either side was allowed to introduce testimony in addition to the foregoing agreed statement of facts, said additional testimony under said agreement to be either oral testimony or in the form of affidavits.

The plaintiff in said case then introduced in evidence the affidavit of J. Howell Green, the substance of the material portions of said testimony being as follows:

Affidavit of J. Howell Green

I have seen and read a paper exhibited to me by attorneys for the City of Decatur, purporting to be a copy of the application of H. M. Atkinson and others for incorporation as The Georgia Railway & Electric Company, and so certified by the Secretary of State on April 28, 1926, said

application being sworn to by P. S. Arkwright on January 24th, 1902 before Felix Camp, Notary Public.

I know as a matter of common and public knowledge, that, from about that date and for approximately ten years [fol. 64] or more thereafter, an extensive system of electric street car lines was operated in and around Atlanta and to Decatur on most or all of the streets named in said application, by a corporation called The Georgia Railway & Electric Comapny, of which P. S. Arkwright was President, and that this included a line running out eastward on Edgewood Avenue from a point near the center of the City of Atlanta, along or near the Georgia Railroad and on the north side thereof, through the territory of several former municipalities of Edgewood, Kirkwood and Oakhurst to Decatur, running in Decatur along Howard Street, formerly called North Railroad Avenue, turning northward near the eastern boundary of Decatur, and making a loop through the Town of Decatur northward by Oak Street, westward by Ponce De Leon Avenue, formerly called Broad Street, to a point near the court house about the center of the city, thence to McDonough St., by East and South Court Square, and coming back by McDonough Street southward to North Railroad Avenue in Decatur at the Georgia Railroad, and thence back westward to the City of Atlanta by the route it went out.

About the first of the year 1912 the operation of electric street railways was commonly known to have passed into the control of a corporation called "Georgia Railway & Power Company," of which P. S. Arkwright was President, said Georgia Railway & Power Company holding the same as lessee.

There has been exhibited to me by the attorneys for the City of Decatur a paper purporting to be a copy of the application of Charles Magee of Toronto, Canada, and others to the Secretary of State, to be incorporated as the Georgia Railway & Power Company, the same filed October 16, 1911 and granted the same day, all as certified by the Secretary of State on April 28th, 1926. The lines of [fol. 65] street railway therein described appear to include those named in the application formerly made for the Georgia Railway & Electric Company as hereinbefore men-

tioned, and, in particular, the line hereinbefore specially described.

The line hereinbefore specially mentioned and described was originally built and operated wholly or in part, by a corporation which was generally known either as The Collins Park & Belt Railroad Company, or the Atlanta Rapid Transit Company, I am not sure which. The Collins Park & Belt Railroad Company was, as I am informed and believe, either sold to a corporation called Atlanta Rapid Transit Company, or the same was so changed, and still later it passed to Georgia Railway & Electric Company, by which Company it was operated, for some time about 1902 until 1912. The line referred to was built by the company named, but whether before the name was changed or afterwards, I am not positive.

In the latter part of 1902 there were three lines of electric railway being operated between Atlanta and Decatur, the most recently built of which was the line hereinbefore particularly referred to. The oldest of the three lay entirely south of the Georgia Railroad and was what was then called and still is The South Decatur line. This has been in operation for more then ten years. It had originally been built by some other corporation. The next oldest was a line built several years before the Main Decatur Line immediately north of the Georgia Railroad, also from about the center of Atlanta. This railroad was either built, or had at one time been owned and operated by a corporation known as Atlanta Railway Company. It ran to Decatur north of the Georgia Railroad but further from it then the other line. In the Town of Decatur it also made a loop and in large part paralleled the loop of the North Decatur or Main Decatur line.

In December of 1902 all three of these lines were owned [fol. 66] and being operated by The Georgia Railway and Electric Company.

About the 29th of December 1902 the Company began tearing up the tracks for the line last above described as having been once called the Atlanta Railway.

Thereupon a proceeding was brought by the City of Decatur in the Superior Court of Fulton County to enjoin the tearing up of the track.

No notice had been given the Town of Decatur of any purpose to tear it up or to abandon its use, and the first the town knew of it was when the tearing up began.

There was a temporary injunction or restraining order granted ex parte. Pending a hearing there was an adjustment reached, and a contract was made in writing about it, between the city government of Decatur and the Company. Thereafter the Company removed the poles, tracks and other structures of the old Atlanta Railway line lying within the town and as far west as a point approximately half way to Atlanta.

In or about the first of the year 1912 it was commonly known that the Georgia Railway & Electric Company leased all or practically all their properties for a long term to a corporation styled the Georgia Railway & Power Company. Since March of 1912 the lessee has operated all these lines in pursuance of that lease or had done so up to the time of the bringing of the present action. Since this action was brought the street railway lines have been continued to be operated as before, apparently by the same interests, though the operating company is now known as the Georgia Power Company. I do not know what the facts are connected with the change of name.

The Town or City of Decatur is the county seat of De Kalb County and the center is about 6 miles from the center of Atlanta, which is the county seat of Fulton County. [fol. 66½] The territory between the two cities was formerly occupied by the municipalities of Edgewood, Kirkwood and Oakhurst. In 1900 the population of Decatur by the census was about 1,400. In 1910 it was about 2,500. In 1920 it was about 6,100. Between 1900 and the present time the population has greatly increased and is believed to be not less than 12,000. The territory occupied by the Towns of Edgewood and Kirkwood is now included within the city limits of Atlanta and those towns *has* been abolished. The territory included in the town of Oakhurst is now included within the City of Decatur and Oakhurst has been abolished. The western limits of Decatur are coterminous with the eastern limits of Atlanta. The intermediate territory is largely, if not wholly urban.

J. Howell Green.

The plaintiff in said case then introduced in evidence the affidavit of T. S. Visscher, W. H. Braswell and J. P. Laird the material portions of said affidavit being as follows:

AFFIDAVIT OF T. S. VISSCHER, W. H. BRASWELL, AND J. P. LAIRD

"I have been regularly riding between Atlanta and Decatur on the Main Decatur line for 20 years, practically twice a day every day.

Prior to the period of the World War the schedule during what are called the rush hours, that is for about three hours or more in the morning, and the same or more in the afternoon, provided a car every five minutes each way, the schedule requiring about 30 minutes. This service continued a number of years.

Besides this, there were intermediate cars after every second car, between Atlanta and Hayes station, a point approximately half way between the centers of the two towns. These were called trippers.

The cars ran express from Atlanta to Elizabeth Street [fol. 67] and between Elizabeth Street and Atlanta, not putting off passengers between Atlanta and Elizabeth Street, and not taking them on between Elizabeth Street and Atlanta.

During that time the cars were generally crowded during the rush hours.

At some time, during or shortly after 1919, trailers were put on during the rush hours, two cars running on each schedule. These cars were of the same seating capacity (48 seats) as the old cars that ran on the 5 minute headway.

When this change was made or shortly thereafter, the schedule was increased to something like 35 or 40 minutes and the intervals between cars was lengthened, to 8 minutes, as the Company claimed, but in fact they are ten minutes or more.

At or about the same time, the Hayes station trippers were taken off and the express limit, which was formerly at Elizabeth Street, was moved back more than half a mile towards Atlanta, at Waddell Street in that part of Atlanta known as Inman Park, thus increasing the number of stops for the Decatur cars by four or five in a thickly populated part of the town. These stops are served as they formerly

were, by two other schedules or lines not running to Decatur.

Notwithstanding the use of trailers, the actual number of cars between Decatur and Atlanta is no larger now than they were under the old arrangement, and the discontinuance of the Hayes station trippers has actually lessened the service in point of numbers, besides the lengthening of the schedule time. Since 1920 the population thus served has greatly increased.

From Oakhurst station which is just within the Decatur limits, coming from Atlanta, it is approximately three quarters of a mile to Pattillo station in Decatur. From [fol. 68] Pattillo Station it is six or seven hundred feet to McDonough Street where the loop begins, and, from that point, the loop is approximately a mile in length back by the court house to the same point at McDonough. Pattillo is the western limit of the 5 cent contract zone as fixed by the judgment of the United — Supreme Court.

During the rush hours of the morning the cars going in to Atlanta are generally fairly well filled up by the time they reach Pat-illo, the number of passengers running from about 20 to 40 on an average, sometimes less than 20 and sometimes more than 40. By the time they reach the city limits, passing Oakhurst, the seats are generally about all taken, the number often running above 50. From there to Waddell Street in Atlanta is the greater part of the distance, and there are about 25 or 30 stops. By the time Waddell Street is reached the cars are badly crowded, the number often running well aboye a hundred.

Conditions during the rush hours of the afternoon are substantially the same as during the morning rush hours.

After the trailers are taken off in the morning, and until they are put back in the afternoon, the patronage on the car will average unusually well, and the cars are often crowded.

The defendant in said case then introduced in evidence the affidavit of F. L. Butler, the material portions of said affidavit being as follows:

AFFIDAVIT OF F. L. BUTLER

He is Vice President and Railway Manager of the Georgia Power Company and as such Railway Manager is in charge

of the street railway department of said company and the operation of its street cars. Prior thereto he occupied a similar relation to the Georgia Railway & Power Company.

Deponent attaches as part of this affidavit a tabulation No. 1 which shows the operating expenses, revenue pas- [fol. 69] sengers and passenger revenue for the street railway system of Atlanta inside what is known as the 7 mile zone for the years 1924-1927 inclusive.

Tabulation No. 2 is attached to this affidavit and made a part hereof and shows the average length of ride per revenue passenger.

The average length of ride per revenue passenger on the entire system is 3.4 miles. The average length of ride per passenger on what has been designated as the Central Decatur line, the line in question in said case, is 5.75 miles which under existing conditions results in the Decatur riders paying 5 cents for an average ride of 5¾ miles, which the average operating expense per revenue passenger for the past four years is 6.16 cents for an average ride of 3.4 miles. The average passenger on the entire system pays the rate of 2 cents per mile while the average Decatur passenger pays only .87 cents per mile, or less than one-half the system average. The average revenue per passenger on the system for the year 1927, was 6.83 cents. The auditor appointed by the Public Service Commission of the State of Georgia in a recent hearing before the Commission found that the total earnings of the Street Railway Department for the year 1926 were $5,278,794.84, and the total operating expenses were $4,527,51[illegible]74. If a 5 cent rate of fare prevailed over the lines of street railway operated in and adjacent to Atlanta had been in effect on all lines of the Company, the gross earnings would have been $3,795,062.05. In other words, the Company would have failed in the amount of $732,452.69 to take in sufficient revenue to pay actual operating expenses. Deponent says that said figures are accurate figures of operating expenses and gross earnings and do not figure any other return upon any investment of the Company used in performing the service.

[fol. 70]

Tabulation No. 1

Operating Expenses, Revenue Passengers, and Passenger Revenue Inside Seven-mile Zone

	1924	1925	1926	1927
Total Operating expenses	$4,592,544.80	$4,813,624.17	$4,704,898.32	$4,155,068.95
Revenue passengers	72,469,776	74,596,348	75,901,241	73,711,924
Passenger Revenue	4,909,040.41	5,052,378.22	5,161,958.41	5,034,237.32
Operating Expense per Revenue Passenger	6.34 ¢	6.45 ¢	6.20¢	5.73¢
Average Revenue per Revenue Passenger	6.773¢	6.775¢	6.80¢	6.83¢

Average Operating Expense per Revenue Passerger, 6.18¢.

[fol. 71] Report to the City of Atlanta on a Plan for Local Transportation

John A. Beeler, Consulting Engineer, New York
Copy of Exhibit 35, Page 173

Average Length of Ride per Revenue Passenger Based on Test Rides

	Routes	Average ride, miles
1	Decatur St.—Marietta Street	2.67
2	Ponce De Leon—Walker West View	2.92
3	Boulevard—West Hunter	1.84
4	Inman Park—Georgia Ave.	2.78
5	Highland—South Pryor	2.87
6	Forrest Ave.—Capitol	2.17
7	West Peachtree—East Hunter	1.72
8	Howell Mill Road—East Fair	2.34
9	Courtland—Central	2.14
10	Peachtree—Whitehall	2.15
11	Luckie—Woodward	2.19
12	Cooper—Richardson	1.45
13	Irwin St.—West Fair	2.04
14	Orme—Magnolia	1.53
15	Piedmont—Washington	3.00
16	Pine Street	1.89
17	Main Decatur	5.75
18	South Decatur—East Lake	5.03
19	River Line	5.36
20	College Park—Hapeville	6.00
21	Stewart Avenue Line	2.81
22	Soldiers Home—English Avenue	3.25
23	Buckhead—Oglethorpe	5.85
24	McDaniel Street Line	2.42
	System Average	3.40

[fol. 72] Defendant introduced in evidence the original answer and cross bill filed in said case, the same being verified by the affidavit of P. S. Arkwright and Thos. K. Glenn, being sworn to by P. S. Arkwright on December 5th, 1925 and being sworn to by Thos. K. Glenn on December

7th, 1925. The said answer and cross-bill by approval of the Court is not here copied and set out in full as it is specified and sent up as part of the record in said case and it is herein approved and specified as part of the evidence in said case.

Defendant introduced in evidence the amendment to the answer and cross-bill filed April 10th, 1926, the same being verified by the affidavit of P. S. Arkwright being sworn to by said P. S. Arkwright on January 29th, 1926 and being sworn to by Thos. K. Glenn on January 29th, 1926. The said amendment to the answer and cross-bill, by approval of the Court, is not here copied and set out in full as it is specified and sent up as part of the record in said case and it is herein approved and specified as a part of the evidence in said case.

The evidence being closed, after argument had, Honorable John B. Hutcheson rendered a final decree in said case as follows, to wit:

DECREE

The foregoing case coming on for final hearing and by consent of parties heard before me acting as Judge and jury, after evidence and argument, it is adjudged and decreed that defendant in said case be and it is hereby enjoined as prayed for in the petition. Judgment for $— costs if rendered against defendant. This September 15, 1928.

To the rendition of said decree and granting said order and judgment, defendant in said case now plaintiff in error excepted and now excepts and assigns the same as error and says that the said decree was erroneous and contrary to [fol. 73] law and contrary to the evidence in said case and without evidence to support it, and that said Judge erred in rendering the same and erred in not denying the relief prayed for by the plaintiff in said case and erred in granting the injunction prayed for therein and enjoining the defendant as prayed and set out in said petition.

Defendant, now plaintiff in error, further says that said Court in not granting to it the relief prayed for in its

answer and cross-bill and its answer and cross-bill as amended erred and excepts to the refusal of said Court to grant each and every one of the prayers and the relief asked for by said defendant, now plaintiff in error, in its said answer and cross-bill as amended and assigns error thereon and says that the court erred in refusing to grant it each and every one of the grounds of relief prayed for and set out in its said answer and cross-bill as amended.

The Georgia Power Company, defendant in said case, now plaintiff in error specifies as material to a clear understanding of the errors complained of the following portions of the record in said case to wit:

PRÆCIPE FOR RECORD

(1) The original petition, together with the exhibits and orders thereon, filed September 29th, 1925;

(2) The original answer and cross-bill of defendant filed on the 7th day of December 1925;

(3) The amendment to the answer and cross-bill filed on the 10th day of April, together with the orders thereon;

(4) The amendment to the answer and cross-bill filed on the 14th day of July 1928, together with the orders thereon;

(5) The final judgment and decree of said court rendered on the 15th day of September, 1928.

And now within the time allowed by law and within 20 days from the rendition of said decree, comes the defendant in said case, now plaintiff in error, and presents this its [fol. 74] bill of exceptions and prays that the same may be signed and certified as provided by law, that the errors alleged to have been committed may be considered and corrected by the Supreme Court of Georgia.

Hugh Burgess, Colquitt & Conyers, Attorneys for Plaintiff in Error.

IN SUPERIOR COURT OF DEKALB COUNTY

ORDER SETTLING BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions is true and sets out and specifies all of record and all of the evi-

dence in said case material to a clear understanding of the errors complained of in said bill of exceptions; and the clerk of DeKalb Superior Court is hereby ordered to make out a complete copy of the portions of the record in said case which are specified in said bill of exceptions and certify the same as such and cause the same to be transmitted to the next term of the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This September 22, 1928.

John B. Hutcheson, Judge DeKalb Superior Court.

Acknowledgment

Service of the foregoing bill of exceptions is hereby acknowledged and copy received. All other and further service waived.

This 22d day of September, 1928.

Alexander & McLarty, Attorneys for Defendant in Error.

[fol. 75] [File endorsement omitted.]

[fol. 76] In Superior Court of De Kalb County

Petition—Filed Sept. 29, 1925

To the Superior Court of said county:

The petition of City of Decatur, as plaintiff complaining of Georgia Railway & Power Company and Georgia Railway & Electric Company, as defendants, shows to the court the following facts, to wit:

1. The City of Decatur, is a municipal corporation under the laws of the State of Georgia, situate, in the said County of De Kalb.

2. That the Georgia Railway & Power Company is a corporation under the laws of the State of Georgia, with power under its charter to construct, own, maintain and operate street railways and electric plants for the generation and transmission of heat, power and light. Its prin-

cipal office and place of doing business is in the County of Fulton, State of Georgia, but petitioner alleges and shows that said Georgia Railway & Power Company has acquired a residence in said County of De Kalb by reason of the fact that it is operating a system of street railways extending from the County of Fulton into the County of De Kalb, and along the public highways between the City of Atlanta in the County of Fulton and the City of Decatur in the County of De Kalb, and in and upon the streets of the City of Decatur; and also a system of lines for the transmission of electric current located in said County of De Kalb and extending into other counties of Georgia; and also by reason of the fact that it has an office and agent in the City of Decatur in the County of De Kalb.

3. The Georgia Railway & Electric Company is a corporation under the laws of Georgia, having its principal office and place of business in the County of Fulton, State of Georgia. The Georgia Railway & Electric Company [fol. 77] under its charter has power and authority to construct, own, maintain and operate street railways and electric plants for the generation and transmission of heat, power and light.

4. Under its charter the said Georgia Railway & Power Company now operates and maintains, and has for several years past, operated and maintained, a system of street railway, occupying various streets and rights of way in the City of Atlanta, in the County of Fulton and suburban communities adjacent to and in the vicinity thereof, to wit: East Point, College Park, and Hapeville, in the County of Fulton, and Decatur, in the County of De Kalb, and upon certain public highways and rights of ways in the Counties of Fulton and De Kalb; operating said railway system as lessee of said Georgia Railway & Electric Company.

5. One of the lines of railway of said system, and a part thereof, is a line, known as the North Decatur line, running from the corner of Pryor Street and Edgewood Avenue, in the City of Atlanta, in an easterly direction through a portion of the City of Atlanta, parallel to and north of the Georgia Railroad, entering the City of Decatur over Howard Avenue and running along Howard Avenue, Oak Street, Ponce de Leon Avenue, Court-house Square and McDon-

ough Street; the length of said line including the loop within the City of Decatur, being approximately six and one half miles.

6. A portion of said North Decatur line lies within the corporate limits of City of Decatur; the length of said line within said corporate limits being two miles, more or less; and the part of said line within said City on which fares of five cents, to and from Atlanta, are charged and collected, as will hereinafter be shown, is slightly in excess of one mile.

[fol. 78] 7. On or about the 4th day of September, 1899, Town of Decatur entered into a franchise contract with Collins Park & Belt Railroad Company, and upon the application of said Company made to the Mayor and Council of said Town, on the 26th day of August, 1899 did by ordinance adopted on said September 4, 1899, grant a permit or franchise to said Collins Park & Belt Railroad Company to build electrically equip and operate an electric street railroad in the Town of Decatur from the Western limits of said town on North Railroad Avenue to Oak Street; thence along Oak Street to Broad Street; thence along Broad Street to East Court Square; thence along East Court Square to South Court Square; thence along South Court Square to McDonough Street; thence along McDonough Street to North Railroad Avenue. The name of said Collins Park & Belt Railroad Company was subsequently to the granting of said franchise changed to Atlanta Rapid Transit Company and an electric railway was built and operated under said franchise; and petitioner is informed and believes that said franchise together with the electric railway built thereunder, was, on or about March 28, 1902, transferred and conveyed by said Atlanta Rapid Transit Company to the Georgia Railway & Electric Company. A copy of said franchise is hereto attached marked exhibit "A."

8. That in December 1902, and prior thereto, the Georgia Railway & Electric Company owned and operated three electrically equipped railway lines between the City of Atlanta, in the County of Fulton, and the Town of Decatur, in the County of De Kalb; one of said lines extended from

near the center of City of Atlanta to the Town of Decatur, south of the Georgia Railroad; two of said lines extending from near the center of City of Atlanta to Town of Decatur, on the north side of the Georgia Railroad. Sometime prior to December 1902, all of said lines were under different ownerships, but in and by December, 1902, all of said lines [fol. 79] had been acquired and were owned by the Georgia Railway & Electric Company.

9. Petitioner shows that the most northerly line of said three railways was known as Atlanta Railway Company line, but in December, 1902, was owned by said Georgia Railway & Electric Company, and that such line entered the western limits of town of Decatur, making a loop in said town, and running upon and along the following streets: Electric Avenue, Atlanta Avenue, McDonough Street, Herring or Depot Street, North Railroad Avenue, Broad Street, Courthouse Square and from Courthouse Square entering Atlanta Avenue and going out over the same line which it had entered the town.

10. The said last mentioned line had been operated for a number of years prior to December 1902, between the City of Atlanta and Town of Decatur, and over and upon the above named streets in said town, and said line was on December 1902, and for many years prior thereto serving a large number of patrons who were not convenient to any other car line, and many residences were built upon and along said line.

11. That on or about the 29th day of December, 1902, the Georgia Railway & Electric Company, without notice to Town of Decatur, began tearing up the track of the last described line of street railway, known as the Atlanta Railway Company line, within the corporate limits of said Town of Decatur, with a view to abandoning the operation of the same, and thereupon the Town of Decatur on December 29th, 1902, brought its equitable petition in the Superior Court of Fulton County, Georgia, setting forth the fact, among other facts that said Georgia Railway & Electric Company was tearing up said line of railway tracks, in the Town of Decatur, with a view of abandoning the same, and the operation of its car- upon said line, and prayed that said Georgia Railway & Electric Company be restrained [fol. 80] and enjoined from tearing up said tracks and

from abandoning the operation of its cars upon said line, and on said date, procured a temporary restraining order from the Judge of the Superior Court of Fulton County, Georgia, and filed said petition with the restraining order thereon in said Court, with process thereto attached, which petition, restraining order and process was served upon the Georgia Railway & Electric Company on the 29th day of December, 1902, together with a rule nisi issued by the Judge of said Court requiring said Georgia Railway & Electric Company to show cause before him on the 14th day of January, 1903, why the prayers of petitioner should not be granted.

12. Petitioner shows that no hearing was had in the Court on said petition, but that said Georgia Railway & Electric Company before the time of hearing thereon made application to Town of Decatur the Mayor and Council thereof, for an adjustment of the matters in said suit, and proposed an amendment to the franchise granted to Collins Park & Belt Railroad Company by Town of Decatur, set forth in paragraph 7 of this petition, and held at that time by said Georgia Railway & Electric Company as transferee, and said Town of Decatur, acting upon the suggestion of said Georgia Railway & Electric Company, entered into negotiations with said Company which resulted in the Mayor and Council of Town of Decatur adopting an ordinance on the 3rd day of March, 1903, amending the franchise granted to said Collins Park & Belt Railroad Company, on the 4th day of September, 1899, which ordinance provided among other things, that said Georgia Railway & Electric Company should have the authority, right, permission and consent to discontinue the operation of, abandon and remove the tracks, poles and other structures constituting the street railway line known as said Atlanta Railway Company, in the Town of Decatur, heretofore described, and [fol. 81] in consideration of such authority and permission, and the benefits resulting to said Georgia Railway & Electric Company therefrom, said ordinance provided that said privileges were granted only on condition that the provisions of said ordinance shall first be accepted by said Georgia Railway & Electric Company, and that said Georgia Railway & Electric Company, its successors and assigns,

whether by contract, or by operation of law, shall be bound to do among other things, the following:

(a) "To never charge more than five cents for one fare for one passenger upon its main Decatur line, above referred to as the Rapid Transit line, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta, and the trip either way shall include the entire loop in the Town of Decatur, though a greater fare may be charged when passengers are transported between the hours of twelve o'clock midnight and five o'clock A. M."

(b) "To gradually, from time to time, as it may obtain permission so to do, and may have funds available for such purpose double track said Rapid Transit line from terminus to terminus, the loop already described in Town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years, in the event it can obtain permission to construct said double track, which said double track when completed, shall be maintained in a substantial, safe and expeditious manner, and shall be operated with cars and rolling stock kept in a safe and comfortable condition."

The said ordinance of Town of Decatur, adopted on the [fol. 82] 3rd day of March, 1903, was accepted by the Georgia Railway & Electric Company, by the adoption of a resolution by the Board of Directors of said Company and the provisions of said ordinance agreed, on or about the 31st day of March, 1903, and a contract embodying the provisions of said ordinance was duly entered into by and between the Town of Decatur and the Georgia Railway and Electric Company, on or about the first day of April, 1903, being signed on the part of Town of Decatur by the Mayor and Clerk thereof, and on the part of the Georgia Railway & Electric Company by its President and Secretary.

A copy of said ordinance, of said resolution and of said contract is hereto attached, the same made a part of this petition to which reference is made as often as may be necessary, which is set forth in exhibit "B" hereto attached.

13. The line described in said ordinance as the main Decatur line or the Rapid Transit line is the same line as now known as the North Decatur line, the route of which is described in paragraph 7 of this petition.

14. Petitioner alleges that said contract, embodying the provisions of said ordinance, set forth in paragraph 12 of this petition, was made in and was to be performed in said County of DeKalb.

15. Petitioner further shows, that after the adoption of said ordinance and the execution of said contract, set forth in paragraph 12, of this petition, the suit of Town of Decatur against Georgia Railway & Electric Company, filed in the Superior Court of Fulton County of December 29, 1902, was settled between the parties and the same was by order of the Court dismissed, with the cost of court against the defendant.

16. Petitioner shows that said contract entered into between said Town of Decatur and said Georgia Railway & [fol. 83] Electric Company has been fully executed on the part of Town of Decatur, said Town of Decatur having permitted said Georgia Railway & Electric Company to take up and remove the tracks, poles and all other equipment connected with said line of railway known as Atlanta Railway Company, in said Town of Decatur which was being operated under an unlimited franchise granted by Town of Decatur, and having permitted the Georgia Railway & Electric Company to abandon the operation of said line, to the detriment and inconvenience of the citizens of said town, upon the promise and obligation of said Georgia Railway & Electric Company that it would perform all the terms and conditions imposed upon it by the ordinance and contract set forth in exhibit "B" to paragraph 12 of this petition; that said Georgia Railway & Electric Company did tear up and remove the tracks, poles and all equipment connected with said line and abandoned the operation of the cars thereon immediately after the execution of said contract, and during all these years it and its lessee, the Georgia Railway & Power Company, have been relieved of the operation of said line and the expense of maintaining the same; and the said line was torn up not only in the

Town of Decatur but to a point at the intersection of McLendon Avenue and Clifton Street a distance of some three and one half miles from the Town of Decatur, within the County of DeKalb.

17. Petitioner is informed and believes that the Georgia Railway & Electric Company on or about the 18th day of March, 1912 leased its entire system of electric railways, located in the Counties of Fulton and DeKalb, in the State of Georgia, operated in the City of Atlanta, and adjoining territory, with lines extending into the municipalities of East Point, College Park, Hapeville, and Decatur, and among which lines of electric railways was the line known [fol. 84] as the North Decatur line, fully described in paragraph 7 of this petition. After the adoption of said ordinance and the execution of said contract, set forth in exhibit "B" to paragraph 12 of this petition, the Georgia Railway & Electric Company continuously operated cars upon said line until the same was leased to said Georgia Railway & Power Company, on or about March 18, 1912, one of the defendants herein, and that since said lease, the said Georgia Railway & Power Company has continued to operate said line, charging only five cents for one fare for one passenger between the City of Atlanta and City of Decatur, and vice versa, and to this date, and have substantially complied with the terms of said ordinance and contract above referred to, during a period of more than twenty-two years, building said double track as provided by said contract.

18. Said ordinance of March 3, 1903, and said contract of April 1, 1903, made in pursuance of said ordinance, as set forth in exhibit "B" to paragraph 12 of this ordinance, is a valid, subsisting, and binding contract upon said defendants, and obligates them to operate said North Decatur line within the limits of City of Decatur, and to and from its terminus in the City of Atlanta to its terminus in the City of Decatur, and vice versa.

19. Petitioner shows that on or about October 5, 1920, said Georgia Railway & Power Company and said Georgia Railway & Electric Company gave notice to the Mayor and Council of Town of Decatur, as follows:

"You are hereby notified that on and after the 20th day of October 1920, the fare to and from Atlanta and Decatur on the Main or North Decatur line operated by the Georgia Railway & Power Company will be at the rate of seven (7) cents.

[fol. 85] Denying the validity or legality of any so-called contracts provi-s limiting such fare to five (5) cents, (set out in an ordinance of the Town of Decatur of March 3, 1903, and an agreement of April 1, 1903, signed by Town of Decatur and the Georgia Railway & Electric Company); you are notified that even if the provision with reference to fare, to and from Atlanta and Decatur, was binding at any time, it is not now binding or legal, and is hereby terminated from and after the above named date.

This 5th day of October, 1920."

This notice was signed by the president of each said defendant Companies and served upon the Mayor of Town of Decatur.

On October 19, 1920, Town of Decatur, in response to said notice, filed its equitable petition in the Superior Court of DeKalb County, known as suit number in said Court as Number 2497, against the Georgia Railway & Power Company and against Georgia Railway & Electric Company, and in said suit said contract, described in the above and foregoing notice, has been adjudicated by the Supreme Court of this State, by the Supreme Court of the United States, and by final decree in this Court, to be a valid, binding and subsisting contract upon said defendants and each of them. Reference to said suit is hereby prayed.

20. Said North Decatur line has since its construction *has* been operated by said defendant companies and their predecessors dependently with and as a part of the single system of street railways which defendants have, and as part of one and the same system, the said North Decatur line has been operated by said defendant companies, and as an evidence thereof, said ordinance of March 3, 1903, set forth in Exhibit "B" to paragraph 12 of this petition, the following provision appears therein:

[fol. 86] "To grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous

ride from any point within the Town of Decatur upon said Rapid Transit line to any point within the City of Atlanta on any of its lines in said City and vice versa, which does not result, however, in carrying passengers on a parallel line, or in the same general direction from which he came, provided such transfer is requested at the time of payment of the fare, and provided the passenger shall abide by such reasonable rules and regulations as the Company may make, so as to limit the time in which such transfer is used, in order that it may be available only for the first connecting car, and in order to cover such other matters as the company may deem necessary or proper to protect the Company from imposition, abuse, or assignment of such transfer, and to avoid liability in damages from mistakes that may be made by the passengers or the employees in regard to such transfers."

21. The defendants have not at any time operated said line of railway alone within the corporate limits of Town of Decatur or the City of Decatur, but at all times it has been operated and maintained in connection with the system of railways in the City of Atlanta, and the entire line of said North Decatur line has been in operation, the cars running thereon its entire length to and from Atlanta and Decatur and the line in Decatur has at all times only as a part of the North Decatur line, passengers aboarding the car on said line in Decatur would or could ride all the way to the terminus of said line in the City of Atlanta, and vice versa, for the one fare and the line has never at any time been limited by said defendant companies, or either of them, to the line within the corporate limits of the City of Decatur.

22. By an act of the General Assembly of Georgia, ap- [fol. 87] proved August 15, 1922, the charter of Town of Decatur was amended so as to change the name from Town of Decatur to City of Decatur, and said Act provided, that no valid subsisting contract then in existence between said Town of Decatur, as heretofore incorporated, and any present Company or corporation, shall be impaired or affected by said act, but that said City of Decatur, as therein incorporated, shall succeed and enjoy all the rights of the Town of Decatur as heretofore incorporated, under and by

virtue of any such contract, and shall assume the obligation undertaken in any such contract.

23. That on September 26, 1925, said Georgia Railway & Power Company and said Georgia Railway & Electric Company notified petitioner of their alleged surrender of the permits, franchises and contracts of Town of Decatur for the construction and operation of the said North Decatur car line, and that they would discontinue operation of the line at the end of the regular schedules on September 30, 1925. A copy of said notice, together with the resolutions adopted by their Board of Directors, authorizing said notice, are hereto attached, all marked Exhibit "C" and made a part of this petition.

24. Petitioner has refused to accept said alleged surrender of said franchises, and has notified defendants of their refusal.

25. Neither of said defendants has the right to surrender said franchises, in law or equity, and by the ordinance of March 3, 1903, and the contract made in pursuance thereof, dated April 1, 1903, and fully set forth in exhibit "B" to paragraph 12 of this petition, the said Georgia Railway & Power Company and said Georgia Railway & Electric Company are bound to maintain and operate said North Decatur line to and from Atlanta and Decatur, in accordance with [fol. 88] the provision of said contract, and they cannot lawful- surrender their said franchises and repudiate the provisions of said contract and violate the terms thereof, and to discontinue the operation of the cars on said line between the terminus of said line in the City of Decatur and the terminus of said line in the City of Atlanta, or any part of said line, is a violation of the terms and provisions of said contract, and is a breach thereof, and for the said defendants to carry out their threats made in said notice and the resolutions attached thereto as set forth in exhibit "C" to paragraph 23 of this petition is an absolute violation of the terms and provisions of said contract of April 1, 1903 and is a breach thereof and a continued breach of said contract and said ordinance of March 3, 1903.

26. There is no law authorizing said defendants to surrender their said franchises, no order of any function of

government authorizing said defendants to cease the operation of cars upon said North Decatur line, or any part thereof, or to discontinue said operation of the same or the rendering of service thereon in the manner which they have given on said line for many years past, and their threat so to do is without warrant of law, and in violation of law and of their said contract.

27. On or about the 23rd day of December, 1909, the Railroad Commission of Georgia passed a general order, known as order Number 14, and under the law of Georgia, said order has the effect of law, relating to subject matters covered by said order. A copy of said order is hereto attached, marked exhibit "D" to which reference is hereby made.

28. At the time of the adoption of said order by the Railroad Commission of Georgia, the said Georgia Railway & Electric Company was operating the said North Decatur line within the corporate limits of Town of Decatur, and [fol. 89] from the terminus in Decatur to the terminus in the City of Atlanta, and vice versa, in accordance with the provision of said ordinance of March 3, 1903, and said contract of April 1, 1903, and said operation was a part of the general system of electric railways in and around the City of Atlanta, as heretofore described, and after March 18, 1912, the Georgia Railway & Power Company continued to so operate said line and said system of lines as the lessee of said Georgia Railway & Electric Company, and has continued to so operate the same to this date.

29. The right of defendants, and each of them, to surrender their franchises, and especially the rights and obligations of the ordinance of March 3, 1903, and the said contract of April 1, 1903, and the right to cease the operation of the line therein described, were determined adversely to them in said suit, number 2497 by the Supreme Court of Georgia and the Supreme Court of the United States, and by the final judgment and decree of this court, in said case, as hereinbefore set forth, and the judgment of said Court in said cause are res adjudicata on the question of the validity of said contract, and are against these defendants.

30. Petitioner alleges that the said contract of April 1, 1903, and the said ordinance of March 3, 1903, were made

and adopted by Town of Decatur for the general benefit of said Town and the public in general, and that a violation and breach of said contract by said defendants, or either of them, will cause and bring about untold and irreparable injury, damage and inconvenience to said City of Decatur and to the citizens thereof and the general public, and there is no adequate remedy to avoid the consequences arising therefrom except by the intervention of the court by an injunction. There are likely to arise a multiplicity of suits [fol. 90] between said defendants and various parties interested, if the threats made in said notice of September 26th, 1925, are put into effect. The damage which would be caused thereby to any number of people is not possible of computation, the injury therefrom would be, as aforesaid alleged, irreparable, and there is no just or adequate remedy for the measurement of such damages.

31. Petitioner brings this action against said defendants upon the contract of April 1, 1903, entered into between Town of Decatur, and the Georgia Railway & Electric Company in pursuance of said ordinance of March 3, 1903, set forth in said exhibit "B" in paragraph 12 of this petition, for the purpose of preventing restraining and enjoining the said defendants from committing a breach of said contract as they have threatened to do in their notice to your petitioner, a copy of which is set out above in this petition.

32. Petitioner shows that if defendants carry out their threats set forth in their said notice of September 26, 1925, your petitioner and members of the public in and around Decatur will be greatly damaged, and such acts will result in the taking of their property without due process of law, and in violation of article 1, Section 1, paragraph 3 of the Constitution of Georgia, which provides: "No person shall be deprived of life, liberty, or property, except by due process of law."

33. Petitioner shows that it is entitled to have the said North Decatur line maintained and operated, as provided by said ordinance of March 3, 1903, and the contract of April 1, 1903, made in pursuance of said ordinance, without any interruption; and unless said defendants are restrained and enjoined, they will, at the end of the regular schedule

on September 30, 1925, cease the operation of cars upon said North Decatur line, will tear up the tracks of said line, [fol. 91] and remove the poles and other equipment thereof to the great inconvenience and damage to petitioner and the public generally.

Now, wherefore, waiving discovery of each of the defendants herein, petitioner prays as follows:

(1) That the said defendants and each of them, their officers, agents, servants and employees, be temporarily and permanently restrained and enjoined as follows:

(a) From violating the provisions of said contract of April 1, 1903, and the ordinance of March 3, 1903, upon which said contract is based.

(b) From violating the provisions of said General Order, Number 14, of the Public Service Commission of Georgia.

(c) From ceasing to maintain and operate said North Decatur line, as at present maintained and operated, and in accordance to the regular schedule for the operation of cars upon said line to and from the City of Atlanta and City of Decatur, or any part thereof.

(d) From abandoning said line, from dismantling or removing the tracks, poles, wires, or other apparatus or equipment of said line, in the corporate limits of the City of Decatur, or any part of said line between the terminus in the City of Decatur and the terminus in City of Atlanta.

(e) From in any manner carrying into effect the threats made in their said notice of September 26, 1925.

(2) That said contract of April 1, 1903, and the ordinance of March 3, 1903, on which said contract is based, be decreed to be valid and binding upon said defendants, and upon each of them, and to require the said defendants to carry out the provisions of said contract.

(3) That it be further decreed that said defendants and each of them have no right to surrender said franchise contract, or to cease operation thereunder.

[fol. 92] (4) That petitioner may have such other and further relief in the premises as it may seem meet and proper to the Court.

(5) That process do issue requiring the defendants, and each of them, to be and appear at the next term of this Court to answer this petition.

(6) That rule nisi issue requiring the said defendants, and each of them, to show cause before this court why the prayers of this petition should not be granted.

L. J. Steele, Attorney for Petitioner.

Duly sworn to by Scott Candler. Jurat omitted in printing.

ORDER TO SHOW CAUSE

The foregoing petition read and considered, sanctioned and ordered filed.

Let the defendants, and each of them, show cause before me on the 24th day of October, 1925, 10 o'clock A. M., in the court house at Decatur Georgia, why the prayers of said petition sould not be granted.

In the meantime, and until further order of Court, the defendants and each of them, their officers, agents, servants and employees are each and all temporarily restrained and enjoined as prayed in this petition.

This the 29th day of September 1925.

John B. Hutcheson, Judge of the Superior Courts, Stone Mountain Circuit.

[fols. 93 & 94] Exhibit "A" to petition omitted; printed side page 6 ante.

[fols. 95-102] Exhibit "B" to petition omitted; printed side page 14 ante.

[fols. 103-109] Exhibit "C" to petition omitted; printed side page 51 ante.

[fol. 110] Exhibit "D" to petition omitted; printed side page 57 ante.

[fol. 111] [File endorsement omitted.]

In Superior Court of De Kalb County

City of Decatur

versus

Georgia Railway and Power Company & Georgia Railway & Electric Company

Injunction Complaint

Summons and Sheriff's Return

To the Sheriff, or his Deputy, of said County and to the Sheriff, or his Deputy, of Fulton County, Greeting:

The defendants are hereby required, personally or by at- [fol. 112] torney to be and appear at the Superior Court to be held in and for said County on the first Monday in December 1925, then and there to answer the plaintiff's complaint as in default thereof said Court will proceed, as to justice shall appertain.

Witness the Honorable John B. Hutcheson, Judge of said Court, this 29th day of September 1925.

B. F. Burgess, Clerk.

Georgia,
De Kalb County:

Served the Defendant Georgia Railway & Power Co., a Corporation by serving C. E. Brown, Agent by leaving a copy of the within writ and process and order, with him personally, at the office and place of doing business of said corporation, in De Kalb County, Ga.

This Sept. 29th, 1925.

O. T. Griffin, Deputy Sheriff.

In Superior Court of De Kalb County

[Title omitted]

Answer—Filed Dec. 7, 1925

Now comes the Georgia Railway & Power Company and the Georgia Railway & Electric Company and each without

waiving their plea to the jurisdiction and without waiving their demurrer heretofore filed for cause of answer say:

(1) Defendants admit paragraphs 1, 3, 7 and 23 of the petition.

(2) Defendants deny paragraphs 2, 4, 5, 6, 8, 9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 25, 26, 28, 29, 30, 32, and 33 of the peti-
[fol. 113] tion as alleged.

(3) As to paragraph 11 of said petition defendants deny the allegations as therein made. Defendants had ceased to operate the line referred to in said paragraph before the filing of said petition and before beginning to tear up and remove the tracks of said line.

(4) Defendants deny paragraph 12 of said petition as therein alleged. Defendants admit that the exhibits referred to in said paragraph and attached as Exhibit "B" to the petition in said case are correct copies of the ordinances and resolution and alleged contract therein referred to.

(5) As to paragraph 15 of said answer, defendants admit that the suit therein referred to was dismissed, but the balance of said paragraph is denied.

(6) Answering paragraph 22 of said petition, defendants deny the conclusions of the pleader therein set out. Defendants say that said Act of the Legislature speaks for itself.

(7) Answering paragraph 24 of said petition defendants say that the surrender of the franchise referred to in said paragraph was complete and effective without any action on the part of plaintiff, and that there was no legal necessity for plaintiff either to refuse or to accept said surrender. Defendants further say that said paragraph is a mere conclusion, and should set out the alleged action of plaintiff in attempting to refuse the acceptance of said surrender.

(8) Answering paragraph 27 of said petition, defendants admit that the Railroad Commission passed the order referred to therein, and that Exhibit D of said petition is a correct copy of said order; but defendants say that said

order is immaterial and irrelevant to said case, and has no application to the situation involved in said case, and af-
[fol. 114] fords no support in law to the case attempted to be made by plaintiff in said petition.

(9) Answering paragraph 31 of said petition, defendants say that the same does not legally require an answer, but defendants deny the right of petitioner to bring the action referred to in said paragraph, or to maintain the case which is attempted to be made in said petition and defendants deny that plaintiff is entitled to any of the rights mentioned in said paragraph. Defendants deny that plaintiff is entitled to any of the relief sought in said case.

(10) And for further answer and by way of cross-bill defendants say: The line of street railway described in paragraph 7 of the petition is separate and distinct from all other lines of street railway of said defendants.

(11) Subsequent to the decision of the Supreme Court of the State of Georgia (149 Ga. Page 1, et seq.) construing the acts of the Legislature of the State of Georgia, of 1907, Acts 1907 page 73 et seq. (Georgia Code Section 2662) conferring jurisdiction upon the Railroad Commission of the State of Georgia (now Georgia Public Service Commission) over street railways, and holding that the claimed contract set out in the petition separates said Decatur traffic and said Decatur line of railway and the franchise under which the same was built and operated from other street railway traffic and other street railway lines placed under the Commission's jurisdiction, said Commission by order effective August 14th, 1919 fixed street railway fares of the defendants under its jurisdiction at 6 cents per ride per passenger and subsequent thereto on September 22nd, 1920, further increased street railway fares of defendants under its jurisdiction to 7 cents per ride per passenger; and with refer-
[fol. 115] ence to Decatur traffic and the line of railway carrying the same held:

"Effective August 14th, 1919, a maximum rate of 6 cents was authorized where a 5 cents fare was then charged except as to fares between Atlanta and Decatur on the Main Decatur line * * * fixed by contracts between the Company and the Town of Decatur * * * held by

the Supreme Court of Georgia to be valid. Patrons on the line immediately between Atlanta and Decatur * * * pay 6 cents. The 5 cents fare now in effect on the Main Decatur line, contracted for under vastly different conditions than not exist, is not fairly compensatory, and, as to the patrons of the company on other routes, are discriminatory. This Commission is without power to increase them."

"Effective October 1st, 1920 applicant (Georgia Railway & Power Company) is hereby authorized to charge and collect as its maximum passenger fare the sum of 7 cents per passenger where a 6 cents fare is now charged. * * * Except such fares on the Main Decatur route as are fixed by contract between the Company and the City of Decatur. * * * Held by the Supreme Court of Georgia, to be valid contracts."

(12) Said commission in said order expressly held that the 5 cents rate of fare as to the said Decatur traffic and said Decatur line was confiscatory, as well as discriminatory, but that it had no jurisdiction over the same. Said holding was that said Decatur line was separate and distinct from the other lines of defendants.

Defendants further say that the Acts of the Legislature of 1907 hereinabove referred to and the ruling of the Supreme Court of the State of Georgia in construing said act was a complete separation of said Decatur Railway line from all the other railway lines of these defendants, mak-[fol. 116] ing of said Decatur line a separate and distinct entity, classifying the same in a classification distinct from the other lines of railway of defendants, and making said Decatur line of railway subject to rules of law, and rules of traffic and rules of operation entirely distinct from the rules applicable to other lines of Railways of these defendants.

(13) Defendants say that the present case is not one in which a commission having jurisdiction over all the lines of a street railway company has the power to fix a rate on some one particular line which may not be fairly compensatory as to that particular line, if the aggregate result of all the lines of railway under the fares fixed by the

commission gives a compensatory return upon the property invested. However, in this connection defendants show that even taking into consideration all the line of Railway of these defendants the result of the operation under present conditions and the 7 cents fare allowed by the commission does not amount to a fair return upon the value of the property devoted to and used in the performance of such service. In the year 1922 there was a failure to earn this legal return on all of said lines in the sum $1,132,290.23; in the year 1923 there was a similar failure in the sum of $1,274,800.53; in the year 1924 there was a similar failure in the sum of $1,476,169.41; and that for the 10 months ending October 31, 1925, there was similar failure in the sum of $1,343,228.88. Moreover, with regard to the rate on the said Decatur line, the Georgia Public Service Commission, as above alleged has already adjudicated that the rate is confiscatory.

(14) Under the said Acts of the Legislature of the State of Georgia, and said decisions and commissions' rulings said line of railway involved in the case at bar and the [fol. 117] franchise under which same was operated and the traffic thereon are separate and distinct from other lines of railway of defendants. Over said line and over the Traffic thereon the Georgia Public Service Commission has no jurisdiction and neither said commission nor these defendants can change the rate of fare so long as the defendants continue to exercise said franchise and to operate said line thereunder. Defendants deny that any of the decisions referred to in said petition hold that said defendants can be compelled to have their property perpetually confiscated or be perpetually compelled to operate said line and to use said franchise at a rate which is confiscatory, and which defendants aver will continue and will always be confiscatory. Defendants say that on account of the facts hereinafter set out it has the constitutional right to surrender said franchise, give up all rights thereunder and cease to operate said line.

(15) Defendants say that the street railway line described in paragraph 7 of the petition is approximately 1 mile (.993 miles) long. What plaintiff designates as the Main or North Decatur line is not a single line of railway

but is composed of several separate and distinct lines of railway, constructed and operated under separate and distinct franchises granted to separate and distinct companies from separate and distinct municipalities and counties. One of said lines runs from the corner of Pryor and Edgewood Streets in the City limits of Atlanta and over various streets of said municipality to the corporate limits of what was formerly the Town of Edgewood. This line was constructed and operated under a franchise from the City of Atlanta. Another of said lines extend- through the corporate limits of what was formerly the Town of Edgewood [fol. 118] to the corporate limits of what was constructed and operated under a franchise from the Town of Edgewood. Another of said lines extends through the corporate limits of what was formerly the Town of Kirkwood. This line was constructed and operated under a franchise from the Town of Kirkwood. One of said lines extends from the limits of what was formerly the Town of Kirkwood through DeKalb County to what was formerly the limits of the Town of Decatur. This line was constructed and operated under a franchise from the County of DeKalb. The other of said lines is the one constructed and operated under franchise from the Town of Decatur approximately 1 mile in length as aforesaid. This line is the only one of said lines for the construction and operation of which any consent or franchise of plaintiff or its corporate predecessor had to be obtained or was obtained. The franchise under which said line was constructed is the only franchise of any of said lines which could be surrendered to plaintiff for the reason that it was the only one of said franchises that was obtained from plaintiff and defendants therefore surrendered to plaintiff as the grantor thereof all the franchise obtained, held or enjoyed by defendants from plaintiff in connection with any one of said lines of Railway.

(16) Defendants allege that to compel them to operate under the claimed contract set out in the petition would be to confiscate defendant's property for that it costs the sum of 8.70 cents to haul each passenger who is required under said contract to be hauled for the sum of 5 cents. Said costs of 8.70 cents, represents only the actual costs

of operation in hauling said passenger, and to make a reasonable return on the investment requires 2.42 cents per passenger per ride in addition, making a total cost per passenger per ride of 11.12 cents, so that the loss on each [fol. 119] passenger hauled under said contract is 6.12 cents. Inasmuch as the enforcement of said contract makes it impossible ever to raise the rate of fare above 5 cents per ride per passenger, this loss to defendants would continue indefinitely and perpetually as long as defendants exercise said franchise and continue to operate said line of railway under said contract. Defendants say that to compel them to continue to operate and to refuse them the right to surrender said franchise and the ordinance of plaintiff hereto attached as Exhibit "A" and made a part of this petition, confiscates the defendants' property. To compel the defendants to go on at such loss would be to take their property without just compensation which is a part of due process of law, and therefore would be a violation of the 14th amendment to the constitution of the United States set forth in section 6700 of the Code of the State of Georgia, and would likewise be a violation of the constition of the State of Georgia in that it would be denying to defendants the equal protection of the law in its property and thus violates Article I, Section 1, Paragraph 2, of the constitution of the State of Georgia, as contained in Section 6358 of the Code of the State of Georgia; that said action invoked at the hands of this Honorable Court by plaintiff would also be a violation of defendants' constitutional rights as protected by Article 1, Section 1, paragraph 3 of the constitution of the State of Georgia, in that it would be depriving defendants of their property without due process of law, and thus violate said paragraph as contained in Section 6359 of the Code of the State of Georgia; and said action so invoked of this Honorable Court by plaintiff would also be a violation of the Constitution of the State of Georgia, and of Article 1, Section 3, [fol. 120] paragraph 1 of said constitution as contained in Section 6388 of the Code of Georgia, in that it would be the taking of the private property of these defendants for public purposes without just and adequate compensation being first paid.

(17) In addition to the confiscatory losses, hereinabove set out, plaintiff is seeking to impose upon defendants large additional burdens which will greatly increase said losses, if defendants be compelled to continue the exercise of said franchise and the operation of said line of railway thereunder. Said claimed contract restricts to 5 cents per ride per passenger any compensation which defendants can receive either now or in the future for the public service rendered in operating said line of railway as aforesaid. Since the date of operation of said so called contract, at the instance of plaintiff, the Legislature of the State of Georgia has modified said contract by purporting to give to plaintiff the right through the imposition of additional burdens to increase the costs of hauling passengers and rendering the public service on said line of railway, while at the same time denying to defendants any right to have or to obtain in any manner increased fares to compensate for said increased costs and to give defendants a return upon their property invested in said service. The Legislature of the State of Georgia by Acts of 1919 page 934, et seq. purported to give plaintiff the right to assess upon defendants certain paving charges for the paving of the streets along which said line of railway is laid and on the 15th day of May 1925, plaintiff passed an ordinance, a copy of which is hereto attached and marked Exhibit "B" and made a part of this answer, whereby plaintiff is undertaking to exercise said power and to compel the payment by [fol. 121] defendants of the costs of paving as aforesaid to the amount of $23,804.50. In addition to said paving costs, by said ordinance plaintiff is undertaking to impose upon defendants additional costs of several thousand dollars for the moving of defendants' tracks and the changing of the grades in said streets to conform to said scheme of paving. Defendants aver that to compel their continued exercise of said franchise and their continued operation of said line of railway under said contract and their payment of said additional burdens sought to be imposed while compelling them still to perform said public service at the grossly inadequate rate prescribed in said contract is an aggravation, of the constitutional wrongs hereinabove set out and is of itself, a further and additional violation of defendant's constitutional rights as stated in the Sections

of the Constitution of the United States and of the Constitution of the State of Georgia, hereinabove specifically set out. With reference to this imposition of additional burdens defendants here repeat specifically the allegations hereinabove made as to the various reasons why said action is a violation of defendants' constitutional rights. To compel defendants to sustain said additional burdens and to deny defendants the right to surrender said franchise violates each and all of the provisions of the Constitution of the United States and of the State of Georgia hereinabove specifically referred to and enumerated. Defendants show that prior to their surrender of said franchise, in an effort to prevent additional losses, defendants communicated with plaintiff, a copy of said communications are hereto attached and marked Exhibits C, D, and E, and made a part of this answer, and endeavored to prevent plaintiff from imposing any additional and unwarranted and confiscatory burdens of paving charges upon defend-
[fol. 122] ants; but said attempts of defendant were unavailing and defendants thereupon surrendered said franchise.

(18) Said Act of the Legislature of the State of Georgia (Acts 1919 page 934 et seq.) purports to confer upon plaintiff the right to assess the paving charges hereinabove referred to not only against the property of the defendant, Georgia Railway & Electric Company, located in the streets along which said paving is to be laid, but also, as construed by the Court of Appeals, of Georgia, undertakes to confer upon plaintiff the right to assess said charges not only against said property claimed to be benefited by said paving, but also against any and all other property of defendants whether located in said streets or not; and to confer upon plaintiff the right to issue judgment and execution personal and general in its nature against defendants, to be satisfied out of any property of defendants, whether claimed to be benefited by said paving improvements or not. Plaintiff under said attempted grant of power is endeavoring to fix not only upon the property of the defendant, Georgia Railway & Electric Company located in said streets a lien for the costs of said paving charges and improvements but is also endeavoring, as shown by said ordi-

nances hereinbefore referred to, to issue against the defendant Georgia Railway & Power Company, which is not the owner of the property in said streets to be paved, a general and personal execution and fi. fa. constituting a lien upon all the property of the defendant Georgia Railway & Power Company, whether located in said streets or not. Defendants aver that the only theory and the only basis in law upon which the said paving charges can be assessed against any property is upon the theory and upon the basis that said paving and improvement is of special benefit to the particular property along which said improvement is made. Defendants aver that, even as to the property of the defendant Georgia Railway & Electric Company, located in said streets where said improvement is to be made there is not and cannot be any direct benefit to said prop-
[fol. 123] erty. Said improvement does not and cannot in any way result in any particular benefit or any benefit of any character even to said property located in said streets. Defendants aver that, even if it could be said that such paving and street improvements could result in benefit to the property of the defendant Georgia Railway & Electric Company located in said Streets, still said benefit would be far less than the costs attempted to be imposed upon defendants and in addition the said costs are largely more than the value of said property in said streets after said improvements are made. Especially is this true in this case, because the only property affected in any way by said improvement is the franchise in said street and the physical tracks and wires of defendant Georgia Railway & Electric Company located therein. Said cost is largely more than the value of said property, including said franchise, and said improvement cannot enhance the value of said property, because the same is already valueless by reason of the fact that said alleged contract prevents it from ever affording any return to its owner, and the impossibility of raising the rate of fare prevents the possibility of any increase in the future on the value of said property. Defendants aver that not only is this true as to defendant Georgia Railway & Electric Company, but the same is even more true as to the Georgia Railway & Power Company, which is not the owner either of said franchise or of any of said physical property in said streets connected therewith.

(19) As already stated aforesaid said Act of the Legislature of the State of Georgia, and said ordinances of petitioner not only undertake to allow the issuance of execution against the property in said streets, and the sale of same thereunder but said act and said ordinances purport to al- [fol. 124] low and petitioner is attemptint to exercise the power of issuing execution against defendant Georgia Railway & Power Company personal and general in its character, under which petitioner can and will unless restrained sell any property of defendant Georgia Railway & Power Company not even remotely adjacent to or affected by said improvement. For said reasons said Act of the Legislature as thus construed, and said ordinances of plaintiff as thus sought to be enforced are unconstitutional and a violation of the 14th Amendment to the Constitution of the United States as contained in Section 6700 of the Code of the State of Georgia, in that it is a depriving of each of said defendants of its property without due process of law and a denial to each of the defendants of the equal protection of the law and are likewise a violation of the Constitution of the State of Georgia Article 1, Section 1, Paragraph 2 as contained in Section 6358 of the Code of the State of Georgia, in that it denies to defendants the impartial and complete protection of their property and also violates Article 1, Section 1 paragraph 3 of the Constitution of the State of Georgia, as contained in Section 6359 of the Code of the State of Georgia, in that it deprives each of defendants of their property without due process of law and is in violation of Article 1, Section 3, Paragraph 1, of the Constitution of the State of Georgia, as contained in Section 6388 of the Code of Georgia, in that it is a taking of the private property of defendants for public purposes without just and adequate compensation first being paid.

Wherefore, having fully answered, defendants pray that the restraining order heretofore granted in said case be dissolved and that the injunction prayed for in said petition be denied.

[fol. 125] Defendants further pray that petitioner be restrained and enjoined, by itself or by any of its officers, or agents or employees from undertaking to enforce against

the property of defendants the costs of the paving and street improvement hereinabove set out.

Hugh Burgess, Colquitt & Convers, Attorneys for Defendants.

Duly sworn to by P. S. Arkwright and Thos. K. Glenn. Jurat omitted in printing.

[fol. 126-128] Exhibit A to answer omitted; printed side page 58 ante.

Exhibit "B" to Answer omitted; Printed side page 44 ante.

[fols. 129-130] Exhibit "C" to Answer omitted; printed side page 48 ante.

[fol. 131] Exhibit "D" to Answer omitted; printed side page 47 ante.

[fol. 132] Exhibit "E" to Answer omitted; printed side page 49 ante.

[fol. 133] [File endorsement omitted.]

In Superior Court of DeKalb County

[Title omitted.]

Amendment to Answer—Filed April 10, 1926

Defendants in the above stated case by leave of the Court first had, amend their answer in said case as follows to wit:

(20) Said ordinance of plaintiff, undertaking to assess the costs of said pavement against defendants applies to defendants a different rule of assessment from that applied

to the other property owners abutting along the streets to be paved. Said ordinance and plaintiff in the enforcement of the same is undertaking to put a different and more costly pavement in that portion of said street for which the charge is to be assessed against the defendants from that which is assessed against said other abutting property owners, the costs of assessment against defendants being proportionately much greater than such costs against other property owners. Said ordinance, and the action of plaintiff in enforcing the same are discriminatory as against defendants, particularly as against defendant Georgia Railway & Electric Company, the owner of the property along which said pavement is laid, and are a violation of the 14th Amendment of the Constitution of the United States as contained in Section 6700 of the Code of the State of Georgia, in that it is a depriving of each of the said defendants of its property without due process of law and a denial to each [fol. 134] of the defendants of the equal protection of the law, and are likewise a violation of the Constitution of the State of Georgia, Article 1, Section 1, paragraph 2 as contained in Section 6358 of the Code of the State of Georgia in that it denies to defendants the impartial and complete protection of their property and are also violative of Article 1, section 1, paragraph 3 of the Constitution of the State of Georgia, as contained in Section 6359 of the Code of the State of Georgia in that it deprives each of defendants of their property without due process of law, and are a violation of Article 1, Section 3, paragraph 1 of the Constitution of the State of Georgia, as contained in Section 6388 of the Code of Georgia, in that it is a taking of the private property of defendants for public purposes without just and adequate compensation first being paid. Said violations of each of said portions of said Constitutions are partiicularly aggravated, because plaintiff is seeking to sell under execution based upon said assessment not only the property of the Georgia Railway & Electric Company abutting said improvement, but also property of both of said defendants which is not abutting on said proposed improvements and which is not located in any wise near or contiguous thereto.

(21) Said ordinance of plaintiff, and the Acts of the Legislature of Georgia (Acts 1919 page 934, et seq.) which

purports to authorize the passage of said ordinance, and the action of plaintiff in undertaking to assess the whole costs of said improvement against defendants are unconstitutional in that the whole costs of the paving and improvement for the portion of the street between the street car tracks and for 2 feet on each side is assessed against defendants without regard to whether such paving and im-[fol. 135] provement is of any special benefit to the property of the defendants abutting thereon or not. For this reason said Act of the Legislature and said ordinance and said assessment and the enforcement thereof are discriminatory as against defendants, particularly as against defendant Georgia Railway & Electric Company, the owner of the property along which said pavement is laid, and are a violation of the 14th Amendment of the Constitution of the United States as contained in Section 6700 of the Code of the State of Georgia in that it is a depriving of each of said defendants of its property without due process of law and a denial to each of the defendants of the equal protection of the law, and are likewise a violation of the Constitution of the State of Georgia Article 1, Section 1, paragraph 1 as contained in Section 6358 of the Code of the State of Georgia in that it denies to defendants the impartial and complete protection of their property, and are also violative of Article 1, Section 1, paragraph 3 of the Constitution of the State of Georgia, as contained in Section 6359 of the Code of the State of Georgia in that it deprives each of defendants of their property without due process of law, and are a violation of Article 1, Section 3, Paragraph 1 of the Constitution of the State of Georgia, as contained in Section 6388 of the Code of Georgia, in that it is a taking of the private property of defendants for public purposes without just and adequate compensation first being paid. Said violations of each of said portions of said Constitution are particularly aggravated, because plaintiff is seeking to sell under execution based upon said assessment not only the property of the Georgia Railway & Electric Company abutting said improvement but also property of both of said defendants which is not abutting on [fol. 136] said proposed improvement and which is not located in anywise near or contiguous thereto.

(22) Said Act of the Legislature and said ordinance and said assessment of the costs of said paving and improve-

ment against defendants are also unconstitutional, and void for the reason that as construed by the Appellate Courts of the State of Georgia, said assessment can be collected out of not only the property affected by said improvement but out of any other property of defendants, and said assessment according to such construction, is held good unless the amount of it exceeds the full value of the property affected as such value will exist even after said improvements have been made; and plaintiff can and will enforce said assessment by selling not only the property affected by said improvement, but to collect the deficit under said sale, by selling other property of the defendants. For this reason said Act of the Legislature and said ordinance and said assessment and the enforcement thereof are discriminatory as against defendants, particularly as against defendant Georgia Railway & Electric Company, the owner of the property along which said pavement is laid, and are a violation of the 14th Amendment of the Constitution of the United States as contained in Section 6700 of the Code of the State of Georgia, in that it is a depriving of each of said defendants of its property without due process of law and a denial to each of the defendants of the equal protection of the law, and are likewise a violation of the Constitution of the State of Georgia Article 1, Section 1, paragraph 1, as contained in Section 6358 of the Code of the State of Georgia in that it denies to defendants the impartial and complete protection of their property, and are also violative of Article 1, Section 1, paragraph 3 of the [fol. 137] Constitution of the State of Georgia as contained in Section 6359 of the Code of the State of Georgia in that it deprives each of defendants of their property without due process of law, and are a violation of Article 1, Section 3, Paragraph 1 of the Constitution of the State of Georgia, as contained in Section 6388 of the Code of Georgia, in that it is a taking of the private property of defendants for public purposes without just and adequate compensation first being paid. Said violations of each of said portions of said Constitution are particularly aggravated, because plaintiff is seeking to sell under execution based upon said assessment not only the property of the Georgia Railway & Electric Company abutting said improvement, but also property of both of said defendants

which is not abutting on said proposed improvement and which is not located in any wise near or contiguous thereto.

(23) Said assessment is confiscatory and unconstitutional for the reason that the costs of said improvements which plaintiff can and will collect out of any property of defendants, whether abutting or not upon said improvements, is greater than the entire value of the property of defendants abutting said improvements and affected thereby, even as such value will exist, after the making of said improvements. Defendants here and now, to escape the levy of said assessments and the collection of the amount thereof from edfendants, offer to surrender to plaintiff all the property of defendants abutting along said improvements and effected thereby and all rights of defendants in and to the same. For this reason said Act of the Legislature and said ordinance and said assessment and the enforcement thereof are discriminatory as against defendants particularly as against defendant Georgia Railway & [fol. 138] Electric Company the owner of the property along which said pavement is laid, and are a violation of the 14th Amendment of the Constitution of the United States as contained in Section 6700 of the Code of the State of Georgia, in that it is a depriving of each of said defendants of its property without due process of law and a denial to each of the defendants of the equal protection of the law, and are likewise a violation of the Constitution of the State of Georgia, Article 1, Section 1, paragraph 1, as contained in Section 6358 of the Code of the State of Georgia in that it denies to defendants the impartial and complete protection of their property, and are also violative of Article 1, Section 1, paragraph 3 of the Constitution of the State of Georgia as contained in Section 6359 of the Code of the State of Georgia in that it deprives each of defendants of their property without due process of law, and are a violation of Article 1, Section 3, Paragraph 1 of the Constitution of the State of Georgia, as contained in Section 6388 of the Code of Georgia, in that it is a taking of the private property of defendants for public purposes without just and adequate compensation first being paid. Said violations of each of said portions of said Constitution are particularly aggravated, because plaintiff is seeking to sell under execution based upon said assessment not

only the property of the Georgia Railway & Electric Company abutting said improvement, but also property of both of said defendants which is not abutting on said proposed improvement and which is not located in anywise near or contiguous thereto.

(24) Defendants show that said ordinance of plaintiff undertaking to assess the costs of paving against defendants; and the Act of the Legislature of Georgia of 1919 [fol. 139] (Acts 1919, page 934, et seq.) which purport to authorize the passage of said ordinance, and the action of plaintiff undertaking to assess the amount of said improvements against defendants are unconstitutional and violative of Article 7, Section 2, Paragraph 1 (found in Code Section 6553 of the Code of the State of Georgia) in so far as the same can be considered as a tax levied upon defendants personally or upon defendant's property; for the reason that under said constitutional provision all taxation should be uniform under the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and collected under general laws, and should be levied and collected under general laws; and the assessment sought to be levied by plaintiff against defendant, and the said Act of the Legislature under which the assessment is sought to be levied violates such constitutional provision in that the tax is not uniform, in that the tax is not ad valorem and in that it is not sought to be levied and collected under general laws, but under a special act, and in that it undertakes to create a personal liability against defendants and is not uniform for that no personal liability is created against others subject to assessment under said act and under said ordinance.

(25) Defendants further show even if there is fixed fare while defendants operate under said franchise and that even if defendants are liable for all the paving assessments as herein set out and described, while so operating, nevertheless the plaintiff cannot compel defendants to continue to operate when defendants surrendered and offered to surrender the entire franchise and all rights thereunder and [fol. 140] also offered to surrender, as set out in paragraph 23 of this answer the property of defendants. That the contract fare can and merely does fix a rate while the defend-

ants are operating under said franchise; and for the plaintiff to impose the additional burdens herein set out and at the same time deny defendants the right to surrender its franchise and all rights thereunder and its action in refusing to accept said surrender are a violation of the 14th Amendment of the Constitution of the United States as contained in Section 6700 of the Code of the State of Georgia, in that it is a depriving of each of said defendants of its property without due process of law, a confiscation of each of defendants property and a denial to each of the defendants of an equal protection of the law; and likewise a violation of the Constitution of the State of Georgia, Article 1, Section 1, Paragraph 2 as contained in Section 6358 of the Code of the State of Georgia in that it denies to defendants the impartial and complete protection of their property and are also violative of Article 1, Section 1, Paragraph 3, of the Constitution of the State of Georgia as contained in Section 6359 of the Code of the State of Georgia, in that it deprives each of defendants of their property without due process of law, and are a violation of Article 1, Section 3, paragraph 1 of the Constitution of the State of Georgia, as contained in Section 6388 of the Code of Georgia in that it is a taking of the private property of defendants for public purposes without just and adequate compensation first being paid. While insisting upon a fixed 5 cent rate of fare the revenue received from which, as heretofore set out in the answer, does not meet operating expenses; the plaintiff by the ordinance Exhibit "B" of the answer adds other and additional burdens which de-
[fol. 141] fendants cannot meet; while by another ordinance Exhibit "A" of the answer it unconstitutionally denies the defendants the right to surrender the entire franchise received from plaintiff.

Colquitt & Conyers, Hugh Burgess, Attorneys for Defendants.

Duly sworn to by P. S. Arkwright and Thos. R. Glenn. Jurat omitted in printing.

[fol. 142] The foregoing amendment allowed and ordered filed as a part of the record in said case. April 10th, 1926.

John B. Hutcheson, J. S. C. St. Mt. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF DE KALB COUNTY

[Title omitted]

AMENDMENT TO ANSWER CROSS-BILL—Filed July 18, 1928

The Georgia Power Company, a corporation of said State represents to the Court, in which representation the Georgia Railway & Electric Co., & the Georgia Railway & Power Co., join as follows, to wit:

Since the filing of the above-stated case, and pending said litigation the Georgia Railway & Electric Company and the Georgia Railway & Power Company have been consolidated and merged into the Georgia Power Company.

Said Georgia Power Company adopts as its own all the pleadings heretofore filed by the defendants in said case, and prays that it be made party defendant in said case, with right to make and carry on all the defenses and claims for counter-relief filed and made by said original defendants and such other defenses and counter-claims as to it may seem fit & which are legal or equitable.

Colquitt & Convers, Attys. Defendants.

[fols. 143 & 144] The foregoing amendment is allowed and the Georgia Power Company is made defendant to said suit with rights as in said amendment prayed & all other rights of a defendant in said case.

This July 14th, 1928.

John B. Hutcheson, Judge Sup. Ct. St. Mt. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF DE KALB COUNTY

DECREE—Sept. 15, 1928

The foregoing case coming on for a final hearing and by consent of parties heard before me acting as Judge and Jury after evidence and argument, it is adjudged and decreed that defendant in said case be and it is hereby enjoined as prayed for in the petition. Judgment for $— costs is rendered against defendant.

John B. Hutcheson, Judge S. C. St. Mt. C.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 145] IN SUPREME COURT OF GEORGIA

6849

GEORGIA POWER CO.

v.

CITY OF DECATUR

JUDGMENT—April 15, 1929

This case came before this court upon a writ of error from the superior court of De Kalb county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Except Presiding Justice Beck, all of the Justices of the Supreme Court were disqualified to preside in this case. Their honors, W. W. Stark, Wm. E. H. Searcy, Jr., James Maddox and I. H. Sutton, Judges of the Superior courts were designated by the Governor and presided in place of the disqualified Justices. The Presiding Justice and all of the Judges concur in the judgment.

[fol. 146] IN SUPREME COURT OF GEORGIA

GEORGIA POWER COMPANY

v.

CITY OF DECATUR

OPINION—April 15, 1929

1. Except the question made as to the effect upon the contract involved in this case between the City of Decatur and the predecessor of the Georgia Power Company, by the offer to surrender to the city the franchise or permit now held by the Georgia Power Company under that con-

tract, the issues in the instant case were involved in Georgia Railway and Power Company v. Town of Decatur, 153 Ga. 329, and were passed upon by this court in the decision rendered in that case.

2. To allow the Georgia Power Company to surrender its franchise or permit and to tear up its tracks would in effect be to allow that company to terminate a contract which has been held valid and which is binding upon the Power Company because of its relation to the corporation which entered into the contract and received the benefits thereof; and this cannot be done, because of the law which makes a valid contract effective according to its terms. And that principle is especially applicable in this case, because, if the contract is set aside or ignored, the situation of the parties anterior to the contract and at the time of making the same can not be restored, inasmuch as the predecessor of the Georgia Power Company, which is now enjoying the benefit of the franchise or permit granted in pursuance of the contract, was permitted to take up and remove another street-railway to Decatur, which served that city and which would probably have continued to be operated had not the predecessor of the Georgia Power Company been permitted to remove the tracks of that railway and substitute therefor the present street-railway; and this permission to remove the tracks of the former railway was [fol. 147] a part of the consideration of the contract now under review.

STARK, Judge:

This suit had its origin in the decision of the City of Decatur in 1925 to pave its streets in accordance with an act of the legislature of Georgia, and to assess certain of the expenses of paving against the street-railway. On July 9, 1925, plaintiff in error notified the City of Decatur that unless it was relieved of the burden of this paving expense, it would be "willing to surrender to the City of Decatur the franchise for this line and remove the tracks from the streets." The city refused this proposition. On September 26, 1925, a communication was addressed to the mayor and commissioners of Decatur, stating, among other things, that the "Georgia Railway and Power Company, as the lessees thereof, concurring herein, hereby formally

surrenders the said permits and franchises granted by the Town and City of Decatur for the construction and operation of the said electric railway hereinbefore referred to." Attached to this notice was a certified copy, or copies, of the resolutions by the board of directors of the Georgia Railway and Electric Company and the Georgia Railway and Power Company. The notice recited when the discontinuance would be put in operation. On September 28, 1925, the City of Decatur by proper resolution refused to accept the surrender of the said franchise, or permit, tendered to it by the street-railway companies, as it would not be to the interest of the city to accept the same. The City of Decatur then filed this equitable petition against the Georgia Railway and Electric Company and the Georgia Railway and Power Company, to prevent the abandoning of these lines, setting up the contract made and entered [fol. 148] into between the city and said street railway companies. Pending this litigation the Georgia Railway and Electric Company and the Georgia Railway and Power Company have been consolidated and merged into the Georgia Power Company. In further discussion of this case we will refer to the ordinance of March 3, 1903, of the City of Decatur and the contract entered into in pursuance thereof, dated April 1, 1903, as if made with the Georgia Power Company instead of Georgia Railway and Electric Company and Georgia Railway and Power Company.

It would seem that every attack that could be made upon this contract of April 1, 1903, has been made by the Georgia Power Company. When it was before this court the last time (Georgia Railway & Power Co. v. Decatur, 153 Ga. 329, S. E. —), it was stated by Wright, Judge: "While the plaintiff in error now insists that some ten distinct points of attack upon the validity of the contract are made in the present appeal that were not made in the mandamus case (149 Ga. 1), it is not and can not be insisted that the identical questions of law were not involved upon the first hearing of the interlocutory injunction (152 Ga. 143, 108 S. E. 615) as are now involved upon this second appeal." We have examined the original record in this court when the case was here before, that we might again have before us the "ten distinct points of attack upon the validity of the contract" referred to in the decision; and every con-

trolling issue was distinctly made and passed upon in that case that is made in the case now before us, unless it be the offer to surrender back to Decatur the franchise, or permit. In paragraph 37 of the company's answer it said: "Defendants show and allege that said so-called contract is indefinite as to the time it is to run; said provision contains no [fol. 149] definite or fixed time during which a fare of five cents is to be charged, and because of said indefiniteness said so-called contract provision is revokable on notice, and as shown by exhibit "D" attached to the petition defendants have served notice on petitioner, terminating said contract on the twentieth day of October, 1920, and so-called contract, if it ever had any force and effect, is now terminated." The company further set out in its answer and cross-bill a copy of the order of the Railroad Commission of the State of Georgia, dated September 22, 1920, among other things stating: "The five-cent fares now in effect on the main Decatur line, * * *, contracted for under vastly different conditions than now exist, are not fairly compensatory, and as to the patrons of the company on other routes, and on intermediate territory on these routes, are discriminatory. This Commission is without power to increase them."

"Defendants further allege that provisions, or contracts, with reference to rates, or fare, being with reference to a legislative or police power, must be for a definite term, not grossly unreasonable, and that where the provisions as to rates are indefinite it is revokable on notice under changed conditions."

The validity of said contract and the terms thereof have been upheld by this court three different times, and by the Supreme Court of the United States. Georgia Railway & Power Co. v. Railroad Commission, 149 Ga. 1; Georgia Railway & Power Co. v. Decatur, 152 Ga. 143; Georgia Railway & Power Company v. Decatur, 262 U. S. 438 (67 L. ed. 1074). Now that the Georgia Power Company can no longer attack the contract, it proposes to abrogate the terms thereof, by surrendering its permit, or franchise, to the City of Decatur, and tear up and remove its rails; and the notice already referred to was given to the City of [fol. 150] Decatur by the Georgia Power Company of its in-

tention to surrender the franchise and cease operation. It was then that the present injunction was filed by the City of Decatur against the Georgia Power Company. We do not deem it necessary in this case to go back of the litigation between the City of Decatur and the Power Company in 1902; but the fact of said litigation and the terms of the settlement of the same that was finally consummated in the ordinance of March 3, 1903, and the contract of April 1, 1903, are germane and very material to the decision of this case. In the negotiations leading up to the settling of the litigation, and the contract made in pursuance thereof, the Power Company was "urging as a reason for such action by Mayor and Council that, if allowed to take up and discontinue said line known formerly as Atlanta Railway Company, said Georgia Railway and Electric Company could and would give to the citizens of said town of Decatur better street-car facilities upon another parallel line of street-railway between the City of Atlanta and the Town of Decatur owned by said Georgia Railway and Electric Company." The terms of this ordinance and contract in pursuance thereof show that it was to be a permanent operating contract between the street-railway company and the City of Decatur. In section 2 of said ordinance and contract it is stipulated that the Georgia Railway and Electric Company, its successors and assigns, whether by contract or by operation of law, shall be bound to do the following things: * * * "To never charge more than five cents for any fare." And then in paragraph 4, providing for the double-tracking in the City of Decatur with reference to this loop: "the loop already described in the Town of Decatur being considered a double track;" and further stipulating: "Which said double track, when completed, shall be [fol. 151] maintained in a substantial, safe, and expeditious manner, and shall be operated with cars and rolling-stock kept in a safe and comfortable condition. Permission to construct said double track in the Town of Decatur is hereby granted."

To allow the plaintiff in error to surrender its franchise and permit and tear up its track would destroy the very terms of the contract itself. It is not so much the franchise that we are dealing with, but the specific contract made in pursuance thereof. The terms of it are that the

company will "never" charge more than five cents for one fare, and that it will maintain the track in a substantial and safe manner and operate it with rolling-stock. When this contract was before the Supreme Court of the United States (262 U. S. 438, supra), that court said with reference to the duration of this contract that "this contract would remain effective until there should be conflicting legislative actions." Under the constitution (Code, § 6448), all that towns and cities have to give to the construction of passenger street-railways within the limits of the same is the consent of the corporate authorities. Regardless of whether the assignments of error in the bill of exceptions raise the question of the expiration of the charter of the Collins Park and Belt Railroad Company, so that it can be considered by this court, it is clear that the City of Decatur, under said contract, could not deny that it had given its consent to the construction of this street-railway system upon its streets. The consent, if not expressly given in this contract, is necessarily implied. All the permit necessary to the use of the streets of Decatur by the Georgia Power Company is either expressly granted or necessarily implied from the terms of said contract. This permit was given to the predecessor of the plaintiff in error. The line sought to be abandoned in the City of Decatur is a part of [fol. 152] a large street-railway system operated by the Georgia Power Company, and the company seeks to abandon the part of this line in Decatur. This, under the terms of its contracts, it cannot do. Fort Smith Light & Traction Co. v. Fagan, 267 U. S. 330.

The case of Morris v. Atlanta Northern Railway Co., 160 Ga. 774, if it is authority at all upon the controlling question in this case, does not strengthen the position of the plaintiff in error. The court in that case quoted approvingly what was said in Coffee v. Gray, 158 Ga. 218, as follows: "Apart from statute, or express contract, the people who put their money in a railroad are not bound to go on with it at a loss, if there is no reasonable prospect of profitable operation in the future." But in the instant case it appears that there was an express contract, and as a part of the consideration of that contract the railway company was permitted to tear up the track of another street-railway which was then serving the City of Decatur

and would have continued to serve it. Bullock v. Florida, 254 U. S. 513 (41 Sup. Ct. 193, 65 L. ed. 380); Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396. The trouble with the plaintiff in error is, it has made an "express contract" with Decatur not to charge more than five cents for one fare. We can take judicial cognizance of the deflation in the value of the dollar, as contended by plaintiff in error, but how can that help the Georgia Power Company under the terms of its contract? And the Supreme Court of the United States said, with reference to this rate contract: "The contract being valid, we are not concerned with the question whether the stipulated rates are confiscatory." The parties having entered into an express contract as to what the fare should be, it is immaterial whether it is confiscatory or discriminatory. Having held, according to the ordinance of the City of Decatur of March 3, [fol. 153] 1903, and the express contract in pursuance thereof, entered into April 1, 1903, that the Georgia Power Company cannot surrender its franchise, or permit, and abandon its line and tear up the tracks from the street, the other questions involved in this case were decided when this contract was before the court in Georgia Railway & Power Co. v. Decatur, 153 Ga. 329 (supra).

Judgment affirmed. The Presiding Justice and the other Judges concur.

[fol. 154] IN SUPREME COURT OF GEORGIA

[Title omitted]

PETITION FOR REHEARING AND MOTION IN THE NATURE OF A REHEARING—Filed April 23, 1929

Georgia Power Company, plaintiff in error in the above stated case, within 10 days from the date of the decision adversely to it in the above stated case, comes now and files this its petition for rehearing and motion in the nature of a rehearing in said case upon the following grounds to wit:

In the opinion as handed down in said case the Court refers to a former case between the Georgia Railway &

Power Company, predecessor of this present plaintiff in error, and the City of Decatur, as reported in the 153 Georgia page 329, same being No. 3019 in said Court. The record in said case No. 3019 as made up in the trial court, to wit, De Kalb Superior Court, and as contained in the records of the Supreme Court of Georgia, was not introduced in evidence or made any part of the agreed statement of facts or incorporated in the brief of evidence of the present case as tried in De Kalb Superior Court and sent by writ of error to the Supreme Court.

Notwithstanding the accuracy of the statement immediately foregoing, the Supreme Court, in the decision of the present case, referred to the record in said former case No. 3019, and incorporated in their opinion in this case alleged extracts from the record in said former case. Without contesting in any way the right and authority of the Supreme Court thus to refer to and make use of said former record, movant submits that any extracts therefrom used in the opinion in the present case should be accurate and not inaccurate extracts; and movant respectfully suggests [fol. 155] and insists that in two instances the Court in the opinion in the instant case made inaccurate extracts from and reference to the record in said former case No. 3019. The two instances of thus overlooking the record and making inaccurate extracts from and reference thereto to which movant calls particular attention, and upon which movant founds this motion for rehearing, are as follows, to wit:

First. The Court in the opinion in the present case uses the following language:

"The Georgia Power Company in that case (No. 3019) set up the expiration of the charter of The Collins Park and Belt Railroad Company."

Movant respectfully insists that this is an utterly inaccurate statement. No such contention was set up anywhere in the record in said former case. The only reference in the record in said former case to the Collins Park and Belt Railroad Company at all was the statement in said record that the franchise under which the line involved in this litigation was laid in the streets of Decatur was a franchise originally granted by Decatur to the Collins Park and Belt

Railroad Company and by subsequent assignment vested in the predecessor of the Georgia Power Company. The charter of the Collins Park and Belt Railroad Company was nowhere in said former record mentioned or even remotely alluded to. Movant now moves the Court for a rehearing in said case and for an expunging from said opinion of the language above quoted. This motion is made, and the action is important to the interests of movant, for the reason that movant intends to appeal said decision in the instant case to the Supreme Court of the United States, and it is necessary, in order for the rights of movant to be fairly adjudged in said court, to have the record in the case freed from this inaccurate and damaging statement.

[fol. 156] Second. The Court in the opinion in the instant case refers to the answer of the defendant (movant's predecessor) in the former case, and to paragraph 37 of said answer, and quotes as follows:

"Defendants show and allege, that said so-called contract is indefinite as to the time it is to run; said provision contains no definite or fixed time during which a fare of five cents is to be charged, and because of said indefiniteness said so-called contract provision is revokable on notice, and as shown by Exhibit "D" attached to the petition defendants have served notice on petitioner terminating said contract on the twentieth day of October, 1920, and said so-called contract, if it ever had any force and effect, is now terminated."

As appears from the extracts thus quoted, said paragraph of the answer referred to and incorporated therein Exhibit "D" of plaintiff's petition in said former case, which said Exhibit "D," as appears from the record in said former case is as follows, to wit:

"To the Mayor and Council of Town of Decatur and to the Town of Decatur:

You are hereby notified that on and after the 20th day of October, 1920, the fare to and from Atlanta and Decatur on the Main or North Decatur line operated by the Georgia Railway & Power Company will be at the rate of seven (7) cents.

Denying the validity or legality of any so-called contract provision limiting such fare to five (5) cents, (set out in an ordinance of the Town of Decatur of March 3rd, 1903, and an agreement of April 1st, 1903, signed by the Town of Decatur and Georgia Railway & Electric Company); you are notified that even if the provision with reference to fare, to and from Atlanta and Decatur, was binding at any time, it is not now binding or legal, and is hereby terminated from and after the above named date.

[fol. 157] This 5th day of October, 1920.

Georgia Railway & Power Company, by P. S. Arkwright, President. Georgia Railway & Electric Company, by John C. Hallman, President."

Movant submits that if the quotation from said former record of paragraph 37 of the defendant's answer therein is to remain in said opinion, then in fairness to this movant, especially in view of the intended appeal, the foregoing Exhibit "D" which was made a part of said paragraph of said answer should also be incorporated in the opinion since it was referred to and incorporated in said paragraph of said answer.

Wherefore movant respectfully prays for a rehearing in said case and for a modification of said opinion as herein set out and for such order and direction in the premises as will preserve the rights of movant and make said opinion conform to the record as above stated.

Colquitt & Conyers, Attorneys for Movant.

[File endorsement omitted.]

Duly sworn to by Walter T. Colquitt. Jurat omitted in printing.

[fol. 158] In Supreme Court of Georgia

[Title omitted]

Order on Petition for Rehearing—April 29, 1929

Upon consideration of the motion for rehearing filed in this case it is ordered that a rehearing be granted by briefs alone to be filed with the clerk of this court by 9 o'clock a. m.,

on Saturday, May 18, 1929. At the same time let counsel for the defendant in error show cause in writing why the judgment of this court of April 15, 1929, should not be vacated.

Let a copy of this order be mailed to counsel for each side, and let a duplicate copy of the motion for rehearing be furnished to counsel for the defendant in error.

[fol. 159] IN SUPREME COURT OF GEORGIA

6849

GEORGIA POWER CO.

v.

CITY OF DECATUR

JUDGMENT AFTER REHEARING—June 28, 1929

Upon consideration of this case after rehearing it is ordered that the judgment of this court rendered therein on April 15, 1929, be hereby adhered to.

[fol. 160] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER CERTIFYING DISQUALIFICATION OF JUSTICES—Dec. 5, 1928

It appearing to the Court that Chief Justice Russell and Associate Justices Atkinson, Hill, Gilbert and Hines are disqualified to preside in the above stated case:

It is ordered that the fact of their disqualification be certified to the Governor, in order that he may designate five Judges of the Superior Courts to preside in said case in lieu of the disqualified Justices.

The Governor is requested to procure the attendance of the Judges designated by him on Saturday, December 15, 1928, at 9 o'clock A. M.

[fol. 161] IN SUPREME COURT OF GEORGIA

State of Georgia, Executive Department, Atlanta

In re

GEORGIA RY. & POWER CO.

vs.

CITY OF DECATUR

Supreme Court

ORDER DESIGNATING JUDGES—Filed Dec. 12, 1928

Whereas, The Supreme Court of Georgia advises by official order that the trial of the above named case has been set for Saturday, December 15, 1928, at 9 o'clock A. M., and that Chief Justice Russell and Associate Justices Atkinson, Hill, Gilbert and Hines are disqualified to preside in the above case, it is

Ordered: That the following Judges of the Superior Courts shall preside in the trial of the above stated case on Saturday, December 15, 1928 at 9 o'clock A. M., in lieu of the disqualified Justices:

Hon. I. H. Sutton, Judge of the Superior Courts of Northeastern Circuit.

Hon. James Maddox, Judge of the Superior Courts of Rome Circuit.

Hon. Wm. E. H. Searcy, Judge of the Superior Courts of Griffin Circuit.

Hon. Blanton Fortson, Judge of the Superior Courts of Western Circuit.

Hon. W. W. Stark, Judge of the Superior Courts of Piedmont Circuit.

This December 6, 1928.

L. G. Hardman, Governor.

By the Governor: Mattie H. Carrington, Secretary Executive Department.

GEORGIA,
Fulton County:

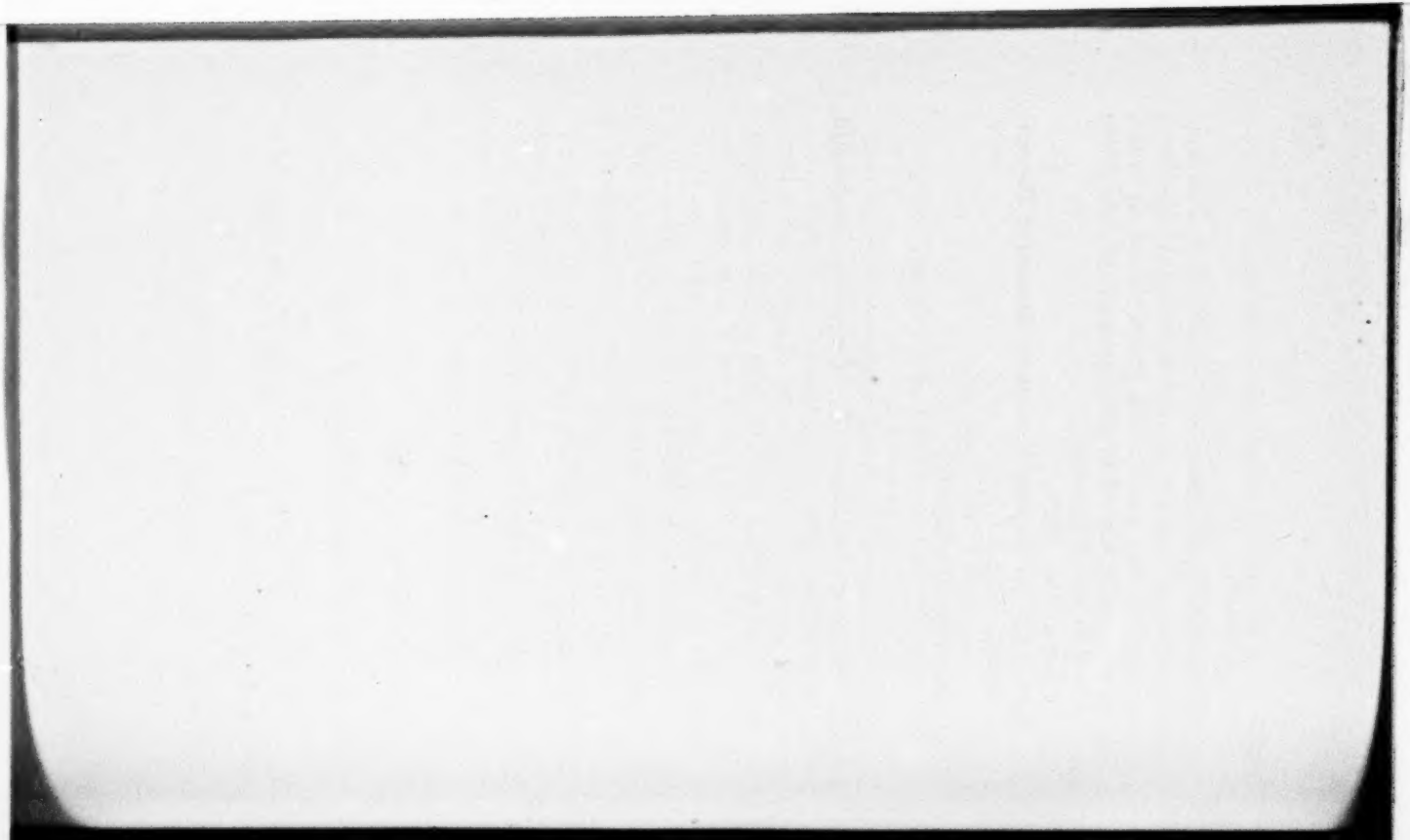
The undersigned as Secretary of the Executive department of the State of Georgia, hereby certifies that the above and foregoing is a true and correct transcript of an order, writing or document, signed by the Governor of said State and of record in this department.

This 11 day of Dec. 1928.

Mattie H. Carrington, Secretary Executive Department.

[File endorsement omitted.]

[fol. 162] Clerk's certificate to foregoing transcript omitted in printing.



SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
AUG 30 1929
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1929

NO. 363

GEORGIA POWER COMPANY
Petitioner

vs.

CITY OF DECATUR
Respondent

PETITION FOR CERTIORARI
AND
BRIEF IN SUPPORT THEREOF

Supreme Court of the United States

OCTOBER TERM 1929

No.....

GEORGIA POWER COMPANY, PETITIONER

vs.

CITY OF DECATUR, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

May it please the Court:

The petition of the Georgia Power Company respectfully shows this Honorable Court:

1.

The City of Decatur (a municipal corporation of the State of Georgia) brought an equitable petition against the Georgia Railway & Power Company and the Georgia Railway & Electris Company (subsequently consolidated into the Georgia Power Company) to enjoin the street railway companies from ceasing to operate its lines (known as the North Decatur line) within the limits of the Town of Decatur and to perpetually compel operation thereof at a five cents rate of fare per passenger; claiming that:

(a) The Town of Decatur (now the City of Decatur) granted a franchise to the Collins Park & Belt Railroad Company on the 4th day of September 1899 (set out in full on

pages 6-8 original record and pages.....of printed record) and the line in question was constructed and operated thereunder within the said municipality. Said line and franchise was conveyed to the Georgia Railway & Electric Company; and on April 1, 1903 said Company and the City of Decatur amended the said franchise grant and entered into a contract which bound the street railway company to perpetually operate the said line in Decatur and "never charge more than 5 cents for one fare for one passenger thereon." (Said contract set out in full on pages 14-22 of original record and pages..... of the printed record.)

(b) That the street railway companies by corporate action sought to end, terminate and surrender its franchise in Decatur and the right to operate thereunder; and did on the 25th day of September 1925 notify the City of Decatur in writing of the surrender of its permits, franchises and contracts with the Town of Decatur under and by virtue of which its North Decatur line was constructed and operated therein; and that they would discontinue operation on the 30th day of September 1925 The City of Decatur refused to accept said surrender and notified the street railway companies of its refusal.

(c) The City of Decatur brought its equitable action to prevent the termination, ending and surrender of the franchises and contracts and to compel continued and perpetual operation at a five cents rate of fare, basing its said action upon the contract of April 1, 1903; alleging that the action of the street railway company in ending, terminating and surrendering the franchises and contracts was a breach of the contract of April 1, 1903, and prayed that by vitue of said **contract** the defendents be **perpetually** compelled to operate said North Decatur line as at present operated, and at a five cents per passenger rate of fare, and that by injunction the street railway companies be forever and perpetually compelled to operate under said contract; and perpetually restrained from claiming that it had expired; and be perpetually restrained from terminating or surrendering it; and that said contract

be held to be a perpetual never ending binding contract, which defendants could never terminate or surrender.

2.

The Street Railway Companies, Georgia Railway & Electric Company and Georgia Railway & Power Company (subsequently consolidated into the Georgia Power Company) showed by answer and cross bill substantially as follows:

(a) The street railway lines in question within the Municipality of Decatur were constructed and being operated under the franchise of September 4th, 1899 granted to the Collins Park & Belt Railroad Company, which franchise was by deed of March 28th, 1902 acquired by the Georgia Railway & Electric Company; that on the 1st day of April 1903 the Georgia Railway & Electric Company and the Town of Decatur entered into the contract referred to, but that neither the franchise nor the said contract placed a never ending obligation on the street railway companies to perpetually operate thereunder; that by proper corporate action the street railway companies had ended, terminated and surrendered the said franchise and contract in question and had surrendered all its rights to operate thereunder; and that the Municipal action in refusing to accept said termination and surrender was illegal and unconstitutional; and if said action was upheld would result in a continual never ending confiscation of the property of the street railway companies, in contravention of the 14th Amendment of the Constitution of the United States.

(b) The franchise and contract did not require eternal and perpetual operation thereunder; and that the property of the street railway companies would be confiscated in violation of the 14th Amendment of the Constitution of the United States, if the action brought by the Municipality was upheld and the street railway companies were perpetually restrained from and denied the right to end, terminate or surrender the franchise or permit and cease operation thereunder; that the rate of fare which the street railway companies could charge (if the street railway companies were

perpetually compelled to operate thereunder) did not even pay the operating expenses and would forever be confiscatory and discriminatory; that such fact had been expressly held by the Georgia Public Service Commission; but said Commission, under the Georgia law, had not been given the power to relieve the same or to pass upon the right to discontinue service. While seeking to compel continued and perpetual operation under said contract, the said City of Decatur was proceeding to pave the streets occupied by the line in question and by virtue of and because of such continued operation would proceed to collect special paving assessment against the street railway company to the amount of $14,000 which would further confiscate the property of the street railway company in violation of the 14th Amendment of the Constitution of the United States if the street railway companies were denied the right to cease operation; and that the street railway companies did not and could not receive any benefit from the street paving; the street railway companies had both the legal and constitutional right to cease operation and to end, terminate or surrender the franchise and contract; that neither the franchise nor the contract compelled perpetual, never ending service, that they had been ended, terminated or surrendered; and to compel continued perpetual, never ending operation thereunder would deprive the street railway companies of their property without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

(c) In former litigation the street railway companies, while continuing to operate under the said franchise or contract in question, had undertaken to compel the Georgia Public Service Commission to fix a reasonable fare to be charged, but the Supreme Court of Georgia held that the line in question was a separate and distinct classification from the other lines placed under said Commission's jurisdiction and that it had been given no jurisdiction over the fare to be charged thereon.

(b) Subsequently the street railway companies, while operating under the said municipal franchise or contract, undertook to raise the contract rate of fare. The Town of

Decatur brought suit against the street railway company to prevent it from changing the rate provided for in the contract In that litigation the controlling question was the power or authority of the Municipality to make a rate contract, and the courts held that the Municipality possessed such authority.

(e) After the said decision the City of Decatur procured a legislative amendment to its municipal charter, giving it the power and authority to lay or construct street paving upon and along the streets of the Municipality occupied by the street railway companies under the said franchise in question; and assess part of the costs of such street paving against the street railway companies; which it could collect by levy on and sale of any property of the street railway companies, whether benefited by or located on or adjacent to the streets paved. In conformity with such charter amendment, the City of Decatur, in 1925, passed certain paving ordinances under which said municipality could proceed to pave its streets along which the line in question had been constructed and was being operated, and then collect the costs of such paving by levy upon any street railway property; that after the passage of such ordinances (but prior to the beginning of the municipal paving) the street railway companies notified the City of Decatur that they were operating said lines in said Municipality at a loss; that the five cent rate of fare did not even pay bare operating expenses; that further continued operation would be made the occasion to subject the street railway companies to a confiscatory street paving assessment; that under the facts in this case neither the street railway companies nor the property of the street railway companies in Decatur could receive any benefit from street paving; that continuing to operate would confiscate the property of the Railroad Companies and that to continue operation and be subject to paving assessment would additionally confiscate their property. Therefore, a request was made that the street railway companies be relieved from such additional confiscatory burdens; otherwise the companies would be compelled to cease further operation within the Municipality. The City of Decatur refused such

request and passed ordinances to pave its streets occupied by the said street railway lines and to assess part of the costs thereof against the street railway companies and collect the same out of the street railway property, other than that along or adjacent to the streets paved. The street railway company then took proper corporate action ending, terminating and surrendering the said franchise or contract and served written notice thereon on the City of Decatur, notifying the Municipality that the street railway companies would cease operation thereunder at a certain time; the street railway companies also offered to surrender to the said Municipality its entire street railway property within the said Municipality constructed or operated under the franchise or contract; the Municipality refused all the said offers or tenders. The street railway companies set up that the equitable suit brought by the Municipality to compel perpetual and continual street railway operatoin was based upon a municipal franchise or contract which did not require continued or perpetual operation and which had expired or been terminated or surrendered; that to refuse the street railway companies the right to cease operation within the said Municipality of Decatur and compel perpetual continued and never ending operation at the five cents rate of fare as provided in said expired, ended or surrendered contract, would be a denial to the companies of their constitutional rights as guaranteed to it by the 14th Amendment of the Constitution of the United States and would result in continual and perpetual confiscation of the property of the street railway companies in contravention of said Constitutional provision.

The street railway company also prayed in its answer and cross bill, that under the facts as herein set out, the Court declare said contract or franchise ended, terminated or surrendered and that it be relieved from further operation thereunder.

8.

The case came on for final hearing before the Superior Court of DeKalb County.

(a) The evidence in the case was undisputed and showed that the five cents rate of fare was both confiscatory and discriminatory; and that compelled continued operation thereunder would confiscate the property of the street railway companies; the street railway companies had taken corporate action terminating, ending and surrendering all the rights to further operation in the Municipality of Decatur. The allegations of fact as set out in the answer and cross bill of the street railway company were proved either by an agreed statement of fact or by undisputed evidence.

Under the undisputed evidence; the question for decision became a question of law, to wit; whether the franchise of September 4th, 1899 and/or the Municipal rate contract of April 1st, 1903, compelled perpetual never ending street railway operation within the Municipality of Decatur; and were such perpetual contracts as could never be ended, terminated or surrendered by the street railway company.

The trial court entered a final decree and adjudged and decreed that the street railway companies be and are hereby enjoined as prayed for in the petition (thus giving effect to every one of the prayers of the petition.)

The effect of this decree was to hold that, under the municipal rate contract in question, the street railway companies were perpetually compelled to operate its street railway lines within the Municipality of Decatur; that said contract was a perpetual never ending contract; that it had not been performed, expired or been terminated or legally surrendered; and that it could not be ended, terminated or surrendered by the street railway companies.

5.

The final decree of the trial court was carried, by writ of error, to the Supreme Court of Georgia, the highest Court of the State in which a decision could be had.

On the 28th day of June 1929 the said Supreme Court of

Georgia finally affirmed and sustained the judgment and decree of the trial court.

6.

Petitioner submits the following reasons why the writ of certiorari should be allowed:

Throughout the proceeding in this case petitioner has specifically set up and contended and now contends that it is being deprived of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, in that the final judgment or decree, affirmed by the Supreme Court of the State of Georgia, perpetually requires petitioner to operate its street railway lines in the City of Decatur and perpetually requires petitioner to render service at a confiscatory and discriminatory rate of fare; and that such compelled perpetual and never ending operation is required under a municipal ordinance, franchise or contract which petitioner specifically claims has been fully performed, has expired or been terminated or ended or surrendered; that where such questions are raised, this Court should determine for itself the extent, terms and duration of the said municipal ordinance, franchise and contract.

(a) That the municipal franchise of September 4, 1899, under which the street railway lines in the City of Decatur were constructed and being operated had expired, been terminated, ended or surrendered by timely written notice; and that such franchise does not require perpetual, never ending operation.

(b) The municipal contract of April 1, 1903 referred and applied to the line as operated under the franchise of September 4, 1899; that said contract taken in connection with said franchise, or said municipal contract taken alone, did and does, not require perpetual never ending street railway operation and that said contract had been fully performed, ended, terminated or surrenderer by timely written notice:

(c) That applying to the municipal franchise of September

4, 1899 and the municipal contract of April 1, 1903 the principle of law as held in numerous decisions of this Court, neither the said franchise nor the said contract taken together or taken alone required perpetual, eternal and never ending street railway operation.

(d) That this Court in a number of cases stated the principle, that a municipality possessing the **power and authority** to make rate contracts can only make them for a definite time **"not grossly unreasonable in point of time,"** and that petitioner is entitled to have this Court determine, whether the municipal rate contract in question compels perpetual street railway operation at the confiscatory and discriminatory rate of fare therein provided, when petitioner has specifically raised the question that such compelled continued and perpetual operation thereunder is and would perpetually deprive it of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States, and that the contract, under which such perpetual operation is required has been performed, has expired, been ended or surrendered.

(e) To compel continued and perpetual street railway operation in the City of Decatur and to deny the street railway companies the right to cease all operation therein would compel petitioner to perpetually operate its property in said Municipality at a never ending loss and because of such compelled operation petitioner and its property would be subjected to further confiscation by virtue of confiscatory paving assessments; and a denial of the Company's right to entirely cease operation and surrender its franchise and contract within said Municipality would unconstitutionally deprive it of its property in contravention of the 14th Amendment of the Constitution of the United States as such compelled perpetual operation is not required under any contract.

(f) Petitioner respectfully submits that the questions specifically raised in the instant case involve federal questions; and are not only of great importance to petitioner, involving the never ending confiscation of its property in violation of

the 14th Amendment of the Constitution of the United States; but questions of general importance; and that the decision of the Supreme Court of Georgia sought to be reviewed, is in conflict with the principle of law as laid down in a number of cases heretofore decided by this Court.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Georgia, to the end that the judgment and decree of the Supreme Court of Georgia may be reviewed and reversed by this Honorable Court.

WALTER T. COLQUITT
BEN J. CONYERS
Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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GEORGIA POWER COMPANY,
Petitioner

vs.

CITY OF DECATUR,
Respondent.

No. .....

OCTOBER TERM 1929

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A full statement of the case appears in the petition for writ of certiorari.

The undisputed facts established the proposition that to compel perpetual and continued operation at the five cents rate of fare, as required by the decision of the Supreme Court of Georgia, the highest Court of the State in which a decision could be had, would require petitioner to perpetually render a Public Utility service at a confiscatory and discriminatory rate of fare.

Petitioner has specifically set out and claimed that it is being deprived of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States, in that the judgment and decree of the Supreme Court of Georgia requires petitioner to operate its street railways in the Municipality of Decatur at a confiscatory and discriminatory rate of fare; and that such compelled, perpetual and continued operation is required under a municipal franchise or contract, which petitioner claims has been fully performed or has expired or been terminated or surrendered; and that the Municipality by virtue of such compelled con-

tinued operation is further confiscating petitioner's property in violation of the 14th Amendment of the Constitution of the United Staes by levying paving assessments against the street railway company for which no benefit will or can be received by the street railway companies.

OPINION OF THE COURT BELOW

The dicision of the Supreme Court of the State of Georgia is set out in full in the record (pages 146-153 original record. Pages ..... printed record.) Said decision was handed down on April 15th, 1929; but, within the time allowed under the rules of practice in the Supreme Court of the State of Georgia a petition for a rehearing and motion in the nature of a rehearing was granted. (See page 158 original record. Pages ..... printed record.)

Thereafter a part of the decision as originally prepared by the Supreme Court was changed and on the 28th day of June 1929 a final judgment was rendered by the Supreme Court of the State of Georgia affirming the judgment theretofore rendered. (See pages 158 and 159 original record. Pages ..... printed record.)

The dicision of the Supreme Court of the State of Georgia affirming the decree and judgment of the lower court was based upon the municipal rate contract of April 1, 1903. (See page 150 original record. Pages ..... printed record.)

JURISDICTION

The jurisdiction of this Court is sought by virtue of the present judicial Code Section 344 (b) (Former Judicial Code Section 237 as amended by the Act of February 13th, 1925) which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest

court of a State in which a decision could be had ... where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution ... of the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

This Court has repeatedly held that where questions similar to the one just heretofore stated are specifically raised and the question sought to be brought to this Court for review involves the duration and the present existence of a municipal ordinance or contract, or whether such contract has been performed, expired, terminated or surrendered and petitioner will be deprived of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States, if the decree of the Court as rendered required continued operation under such claimed municipal franchise or contract, it will determine for itself the extent, terms and duration of such Municipal franchise and contract.

In the Railroad Commission of Texas vs. Eastern Texas Railroad Company, 264 U. S. 79, 76, this Court held:

> "Where it becomes necessary to consider whether a state is depriving, or attempting to deprive, a litigant of property without due process of law, in violation of the 14th Amendment, and the question turns on the existence and terms of an asserted contract, this court determines for itself whether there is a contract and what are its terms, Louisville & N. R. Co. vs. Palmes, 109 U. S. 244, 255, 27 L. ed. 922, 929, 3 Sup. Ct. Rep. 193; Stearns vs. Minnesota, 179 U. S. 223, 232, 45 L. ed. 162, 169, 21 Sup. Ct. Rep. 73.
>
> The principle is general and necessary. Ward v. (87) Love County, 253 U. S. 17, 22, 64 L. ed. 751, 758, 40 Sup. Ct. Rep. 419. If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the State tribunal, as to what are the facts alleged to give rise to the right, or to bar the assertion of it even upon local grounds. Davis vs. Wechsler, 263 U. S. 22, 24, ante, 134, 145, 44 Sup. Ct. Rep. 13."

To the same effect see

Columbus Railway, Power & L. Co. vs. Columbus 249 U. S. 399, 406, 407.

See also the following cases decided by this Court in which exactly similar questions to the one involved in the case at bar were brought to this Court for review; and the decision rendered in each case is controlling in favor of petitioner's contention hereafter discussed.

Cleveland U. R. Co. vs. Detroit, 204 U. S. 116;

Detroit U. R. Co. vs. Detroit, 229 U. S. 39;

Blair vs. Chicago, 201 U. S. 400.

In said cases it was the street railway company which contended that certain municipal rate contracts (entered into between the street railway company and the Municipality) had the effect of extending former municipal franchises; and that under such municipal rate contract the street railway company had been given the right and authority to continue operation upon the streets in the Municipality. We respectfully submit, that the municipal rate contracts under consideration in each of said cases were more susceptible of such construction, than the municipal rate contract in the case at bar (hereinafter discussed). This Court, however, held that under the principle of law as repeatedly announced by it, it was impossible to hold that the municipal rate contract extended the franchise; and therefore the street railway company only had the right to operate within the Municipality for and during the definite franchise period. For instance see the case of Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 43-45, (where former cases of this Court are quoted and discussed). It is, of course, immaterial, that in the case at bar, it is the street railway company which contends that the municipal rate contract in question does not extend the duration of its franchise; and that, therefore, under such municipal rate contract it cannot be required to render perpetual never ending operation and service.

Such municipal rate contracts are to be similarly construed, whether the street railway company is contending that it has the right to further operate thereunder, or is denying the Municipality's right to compel perpetual never ending operation thereunder.

Applying the principle of law (as announced in the cases of this Court just heretofore cited) to the Municipal Rate Contract involved in the case at bar, then as held by this Court in the case of Denver vs. Denver Union Water Company, 246 U. S. 178, 184; "It is a necessary corollary that the Company may discontinue its service at will."

SPECIFICATIONS OF ERROR

The specifications of error are set out in the petition for certiorari under the 6th Paragraph, heading "Reasons Why the Writ of Certiorari Should Be Allowed," and are as follows, to wit:

(1) The Supreme Court of the State of Georgia erred in finding and holding that the municipal rate contract of April 1, 1903 requires perpetual, never ending street railway service within the Municipality of Decatur and that said contract was a perpetual never ending one.

(2) The Supreme Court of the State of Georgia erred in not holding that the contract of April 1, 1903 had been performed, expired or terminated or legally surrendered and erred in holding that said contract could not be terminated, ended or surrendered by the street railway companies ceasing to operate within the Municipality.

(3) The Supreme Court of the State of Georgia erred in not holding that the municipal rate contract of April 1, 1903 should be construed in connection with the franchise of September 4, 1899 and that said franchise and contract had been performed, expired, terminated or legally surrendered.

(4) The Supreme Court of the State of Georgia erred in not holding and finding that said contract of April 1, 1903

referred and applied to street railway lines as operated under the franchise of September 4, 1899, and that said contract taken in connection with said franchise, or said municipal contract taken alone, did not require perpetual never ending street railway operation within the Municipality of Decatur.

ARGUMENT

The legal argument with reference to said specifications of error involve the construction of the franchise of September 4, 1899 and the construction of the municipal rate contract of April 1, 1903. We respectfully submit that the decision of the Supreme Court of Georgia is in conflict with the decisions of this Court just heretofore cited, and with the principles of law as laid down therein and the other decisions hereafter cited.

THE DECATUR MUNICIPAL FRANCHISE OR CONTRACT HAVE BEEN FULLY PERFORMED, ENDED, EXPIRED OR BEEN SURRENDERED

In former litigation the power and authority of the parties to enter into a rate contract has been upheld. The record in such former litigation was not introduced in evidence and formed no part of the record in this case; as, what was there adjudicated does not affect the questions herein raised.

In the present litigation the power and authority of the parties to enter into a rate contract is not raised and neither is the street railway company, while continuing to operate under the franchise or contract, undertaking to charge a rate of fare different from that therein provided.

The present litigation involves the questions of the right to surrender the franchise or contract; whether or not it has expired, been terminated or ended, and whether the street railway company can perpetually be compelled to operate thereunder at a confiscatory rate of fare.

A similar situation existed in the case of Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116, 130. There it appeared

that the Supreme Court of the United States had twice theretofore rendered opinions upholding the validity of the municipal rate contract and when the case was again brought before this Court it said: "Therefore, in deciding this case, we assume the validity of the contract whatever it is that was made. The only question involved herein is one of construction and intent." This Court then decided for itself the duration of the various municipal franchise and rate contracts therein involved.

The question now sought to be brought to this Court for decision is not one in which petitioner is seeking to continue to operate under a municipal franchise or contract and at the same time contest the validity or extent of its rate of fare provision. By proper corporate action petitioner has surrendered all its rights to operate thereunder; and also contends that the municipal franchise and contract in question have been terminated, ended, been performed or surrendered and that to compel continued and perpetual operation thereunder; at the discriminatory and confiscatory rate of fare, would deprive it of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

The action brought by the City of Decatur to compel perpetual continued street railway operation of the line in question is based entirely upon the contract of April 1, 1903 (See paragraph 31 of the petition, page 90 of the original record. Page ..... printed record.) In considering whether such contract requires perpetual and never ending operation it will first be considered in connection with the municipal franchise under which the line in question was constructed and operated.

THE FRANCHISE UNDER WHICH THE LINE IN QUESTION WAS CONSTRUCTED AND BEING OPERATED HAS EXPIRED AND BEEN TERMINATED BY TIMELY WRITTEN NOTICE

The line in question was built, constructed and being

operated under a franchise from the City of Decatur to the "Collins Park & Belt Railroad Company," granted September 4, 1899. (Agreed statement of facts Original Record pages 6-8, printed record pages ..... where the entire franchise is set out.)

In 1900 the name of the "Collins Park & Belt Railroad Company" was changed to "Atlanta Rapid Transit Company."

In 1902 the franchise in question was conveyed by deed from "Atlanta Rapid Transit Company" to "Georgia Railway & Electric Company."

(Agreed statement of facts Original Record pages 6, 14, printed record pages ..... .)

The change of the name of Collins Park & Belt Railroad Company to Atlanta Rapid Transit Company and the deed from Atlanta Rapid Transit Company to Georgia Railway & Electric Company are only material as showing the chain of title of the franchise in question into the Georgia Railway & Electric Company.

On April 1, 1903 the Georgia Railway & Electric Company entered into a contract with the Town of Decatur, fixing a five cents contract rate of fare to be charged on the said line, designated therein as the Rapid Transit Line.

The franchise in question expired August 16, 1919 *and thereafter continued operation thereunder since said date has been similar to a tenancy at will or at sufferance.*

The Collins Park & Belt Railroad Company was incorporated under the Acts of the General Assembly approved August 16, 1889.

(Agreed statement of facts Original Record pages 1-6, printed record pages ..... where the entire act is set out.)

The duration of its charter was not therein specially set out, therefore, under the law of Georgia, its charter expired 30 years from the date of its grant or 30 years from August 16, 1889, or August 16, 1919.

Georgia Code 2215 provides:

> "Corporations have continuous succession during the time limited by their charter, notwithstanding the death of their members. Should any charter granted in future by the General Assembly to a private corporation be silent as to its continuance, such charter shall expire at the end of 30 years from date of its grant."

See also

West End & Atlanta St. Rd. Co. vs. Atlanta St. Rd. Co. 49 Ga. 151 (1).

The Central R. & B. Company vs. State of Georgia, 54 Ga. 404, 420; 422.

The franchise in question was granted to the "Collins Park & Belt Railroad Company."

(Original Record pages 6-8. Printed Record pages .....)

Under all the authorities the duration of such franchise is for and during the charter life of the Company, therefore, the municipal franchise of the said Rapid Transit line in Decatur expired August 16, 1919.

Turnpike Co. vs. Illinois, 96 U. S. 63.

Blair vs. Chicago, 201 U. S. 400;

Omaha Electric Light & P. Co. vs. Omaha, 179 Fed. 455 (3), 460.

Wyandotte Elec. Lt. Co. vs. City of Wyandotte, 124 Mich. 43; 82 N. W. 821.

Rokworth vs. St. Road Bridge Co. 108 N. W. 785.

The conveying of this franchise to successive street railway companies does not change its duration and is immaterial except as showing title thereto.

Virginia Cannon Toll Road Co. vs. People, 22 Col. 429; 37 L. R. A. 711, 718, 719.

Blair vs. Chicago, 201 U. S. 400, see pages 481, 482.

The said Decatur franchise by its terms expired on August

16, 1919. Subsequent to that date the continued operation of said line thereunder constituted a relationship between the municipality and the operating street railway company similar to that of tenancy at will.

Omaha Electric Light & Power Company vs. City of Omaha, 179 Fed. 455 (3), 460

Detroit United Ry. Co. vs. City of Detroit, 229 U. S. 39, 42.

City and County of Denver vs. New York Trust Company, 229 U. S. 123; 142.

Or a tenancy at sufferance.

Sutton vs. Hiram Lodge, 88 Ga. 770.

Standley vs. Stembridge, 140 Ga. 750 (5), 754, 757.

Crawford vs. Crawford, 139 Ga. 394 (4), 396, 399.

Either of such tenancies can be terminated by either party by reasonable notice.

Denver vs. Denver Union Water Co. 246 U. S. 178; 184

Western U. Tel. Co. vs. Fain & Parrott, 52 Ga. 19, 22.

On the question of notice see also

Risley vs. City of Utica, 179 Fed. 885, and cases there cited.

In a tenancy at will or a tenancy at sufferance a party while continuing to occupy the premises cannot escape the burdens incident thereto; but either party can terminate such burdens and put an end to such further continued relationship by notice.

All the authorities hold that operation under an expired municipal franchise creates an exactly similar relationship.

See cases heretofore cited.

Plaintiff in error took proper corporate action terminating and surrendering the franchise in question.

(Original Record pages 51-57. Printed Record pages.....)

Proper and reasonable notice of such action was given to

the municipality, the only party upon whom such notice could be served.

(Original Record pages 51-57. Printed Record pages.....)

The franchise having expired by its terms and the holding over having been terminated by due and reasonable notice, it is inconceivable how respondent can sustain the decree perpetually enforcing continued street railway operation thereunder.

It certainly would not be held that a landlord could successfully maintain a suit in equity and by injunction perpetually compel a tenant at will or sufferance to continue to occupy his premises because the landlord desired to enjoy for all time to come the benefits he was receiving by such continued occupancy; yet, that is exactly what is done by the decision in question.

We have found no case in conflict with the legal principles just heretofore discussed.

We respectfully submit, that the Supreme Court of Georgia in effect, admits the legal contention just heretofore stated, to wit; that the franchise in question has expired, terminated and ended; for, that Court in its opinion said "It is not so much the franchise we are dealing with, but the specific contract made in pursuance thereof;" and then based its opinion upon the contract of April 1, 1903.

We submit that under a number of decisions of this Court the duration of the franchise and the right to surrender it, is decisive of the duration and the right to surrender a contract made with reference thereto.

Cleveland E. R. vs. Cleveland, 204 U. S. 116, 130.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.

Blair vs. Chicago, 201 U. S. 400.

The contract of April 1, 1903 in referring to the Rapid Transit line did not undertake to change the duration of the franchise under which said line was being operated or the

rights of the parties to terminate it or cease operation thereunder.

This Court has repeatly held that the duration of municipal franchises and contracts cannot be extended by implication.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39; 43; 44.

Blair vs. Chicago, 201 U. S. 401, 471, 474.

MUNICIPAL CONTRACT OF APRIL 1, 1903

Said municipal contract is set out in full on pages 14-22 of the original record. Pages ..... printed record.)

The municipal contract of April 1, 1903 did not expressly or by implication extend the duration of the franchise, under which the line in question was constructed and being operated within the City of Decatur; and did not and could not affect franchises from other municipalities.

This contract first deals with discontinuance and removal from the streets of Decatur of a line of track known as the Atlanta Railway Company and required the street railway company upon such removal to restore the surface of the streets in good condition. There is no contention that the franchise of the Atlanta Railway Company in Decatur had not expired long prior to the present litigation. The discontinuance of the Atlanta Railway Company's line 26 years ago (in 1903) does not affect the duration of the franchise of the Atlanta Rapid Transit line.

The other parts of the said contract by actual terms and description relate and refer to "Atlanta Rapid Transit Line." There is not a word or line which, either expressly or by implication, deals with or undertakes to extend the duration of the franchise of said Rapid Transit line. The length of time said line must operate in Decatur is not extended. When the contract of April 1, 1903 was made it did not and was not intended to cover or deal with such questions. The City of Decatur's Municipal franchise under which the Atlanta Rapid Transit line was being operated had not expired; by

its own terms it was to continue for a further duration of 16 years. The said contract of April 1, 1903 was not intended to and did not (either expressly or by implication) undertake to modify, enlarge or change or deal with that question.

In the cases in which this Court has had municipal contracts, (with much broader provisions than those contained in the contract of April 1, 1903) before it for consideration; it has in every case held that such contracts did not extend or enlarge the duration of the former municipal franchise.

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 166.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.

Blair vs. Chicago, 201 U. S. 400.

We respectfully submit that the contract of April 1, 1903 in no way changed the duration of the municipal franchise of Atlanta Rapid Transit Company line (heretofore discussed) or the rights of the parties with reference to its termination or surrender.

The Supreme Court of Georgia largely relied upon the expression of the contract "to never charge more than five cents for one fare."

The provision of the contract is "to never charge more than five cents for one fare, upon its Decatur line above referred to as the Rapid Transit Line." (The said line in Decatur is then described in detail.)

It will be seen that said provision or contract as to the rate of fare was made with reference to the line already constructed and in operation. It fixed the rate of fare while the line was operating. Such provision did not undertake to compel perpetual and never ending operation.

This exact question was before this Court in the case of Cleveland E. R. Co vs. Cleveland, 204 U. S. 116 in which it was held that the municipal rate contract did not change the duration of the franchise.

See also

Detroit U. R. Co. vs. Detroit, 229 U. S. 39; 43; 44; 45.

In Charleston Isle of Palms Traction Co. vs. Shealey, 266 Fed. Rep. 406 the Court held that a five cents rate of fare was fixed by contract; and that the street railway company was bound thereby while it operated thereunder; but, also further held; that the street railway company had the constitutional right to cease operation thereunder and thus avoid the confiscatory rate.

As to such right to discontinue operation.

See also

Railroad Commission of Texas vs. Eastern T. R. Co. 264 U. S. 79, 85, 86.

In the case of Brooks-Scanlon Co. vs. Railroad Commission of La. 251 U. S. 396 this Court held: "A carrier cannot be compelled to carry on even a branch of business at a loss."

In the case of State of Iowa vs. Old Colony Trust Company, 215 Fed. 307, 313 (cited approvingly by this Court in many cases) the Court held that "A railroad company may abandon an unprofitable and irreclaimable part of its road and neither the State nor unfortunate investors along the line can justly complain."

In the case of Munn vs. Illinois, 94 U. S. 113, 192, this Court said:

> "The grantor may withdraw his grant by discontinuing the use; but so long as he maintains its use, he must submit to the control."

To the same effect see

Erie Board of Public Utility Commissioners, 254 U. S. 394, 411.

It has been repeatedly held that a street railway company can surrender such a franchise as the one in question to the

municipality which granted it and discontinue operation over the tracks within the municipality covered by it.

Stiles vs. Citizens Electric Street Railway Co. 19 L. R. A. (N. S.) 865; 199 Mass. 294, 85 N. E. 419.

State of Montana & Knight vs. Power Company, 44 L. R. A. 692, 22 Montana 391, 65 Pacific 685.

San Antonio Street Railway Company vs. State of Texas, 35 L. R. A. 662, 30 S. W. 926.

Charleston Isle of Palms Traction Co. vs. Shealey, 268 Fed. 406.

Southern Bell Tel. & Tel. Co. vs. Railroad Commission of South Carolina, 280 Fed. Rep. 901, 902 (7).

Gilschrist vs. Waycross Street & Suburban Railroad Co. 246 Fed. Rep. 952.

The Supreme Court of the State of Georgia said: "When this contract was before the Supreme Court of the United States (262 U. S. 438 supra) the court said with reference to the duration of this contract, "that this contract would remain effective until there should be conflicting legislative action."

That case arose over an endeavor on the part of the street railway company, while operating under the franchise, to change the contract rate of fare as added to the franchise by the contract of April 1, 1903. The street railway companies served notice on the Municipality of Decatur that on and after October 20, 1920 it (the street railway company) would charge a seven cents rate of fare on the said North Decatur or Rapid Transit Line. The Municipality of Decatur then brought an equitable suit to enjoin the street railway company, while operating under the franchise in Decatur, from changing the rate of fare, as provided in the contract. In answer to such suit the street railway company contended lack of power and authority in the Town of Decatur to make a rate contract; that the rate of fare provision was not a contract.

The decision of this Court shows that it was dealing with

such questions and not with the right of the municipality to compel perpetual never ending operation thereunder.

The question there decided is entirely different from the one involved in the present litigation. As controlling on this question see

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116, 130.

The Supreme Court says that the contract of April 1, 1903 if not expressly, **impliedly** gives consent to the operation of the line in question within the municipality.

The provision of the contract to which the Supreme Court of Georgia was referring is as follows:

> "To gradually from time to time, as it may obtain permission so to do and may have funds available for such purpose, double track said Rapid Transit line from terminus to terminus, the loop already described in the Town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years, in the event it can obtain permission to construct said double track, which said double track, when completed shall be maintained in a substantial safe and expenditious manner and shall be operated with cars and rolling stock kept in safe and comfortable condition. Permission to construct said double track in the Town of Decatur is hereby granted."

That such and similar provisions do not extend the duration of the franchise (the franchise of September 4, 1889 heretofore discussed) was held by this Court in Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116.

See also

Detroit U. R. Co. vs. Detroit, 229 U. S. 39; 44, 45.

Blair vs. Chicago, 201 U. S. 400.

The said provision of the contract was not an undertaking on the part of the parties to change or affect the duration of the franchise under which the line was being operated.

The agreed statement of facts show that no double track

was laid within the Municipality of Decatur under it; however, this is immaterial for as held in the Cleveland case (204 U. S. 116, 137-140) a right given to construct an additional track would not affect the duration of the franchise under which the single line had been constructed. In fact the contract in question, provides that the loop in Decatur (as already constructed) was to be considered a double track. Nothing said in said contract was intended to affect the duration of franchises received from other municipalities. While operating, a legal duty rests upon the company to maintain its tracks in a safe and expeditious manner and to keep its cars and rolling stock in good and comfortable condition. This, however, does not compel perpetual never ending operation at a loss.

City of Texas vs. Eastern Texas Rd. Co. 264 U. S. 79, 85.

Also see

Texas & R. P. Co. vs. Marshall, 136 U. S. 393.

Jones vs. Newport News, 65 Fed. 736, 741 (2).

Texas & P. R. Co. vs. Scott, 77 Fed. 726 (2), 730.

In the case of Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116, 133 the grants then being considered by this Court specifically referred to lines which were to be operated in connection with other and different lines. Nevertheless this Court held that such reference did not have the effect of extending the duration of any line, though the lines referred to had franchises of longer duration.

THE PRINCIPLE OF LAW REPEATEDLY ANNOUNCED BY THIS COURT IN CONSTRUING MUNICIPAL CONTRACTS

This Court has repeatedly held that municipal rate contracts do not compel perpetual and never ending operation.

In the case of Texas & P. R. Co. vs. Marshall, 136 U. S. 393 this Court held; that a municipal contract providing that in consideration of certain donations made by the City, a rail-

road agreed that it would permanently establish its terminus in the City was performed by maintaining it there for eight years.

Certainly, under the undisputed facts in the case at bar, the street railway company cannot be compelled to perpetually operate under the municipal rate contract in question.

In the case of Home Telegraph & Tel. Co. vs. City of Los Angeles, 211 U. S. 265, this Court expressly held that municipalities possessing the power and authority to make rate contracts can only make them for a definite time "not grossly unreasonable in point of time." In subsequent decisions this Court has restated and followed that legal principle. (For illustration see cases cited in note (a)).

The contract of April 1, 1903 was made with reference to the Rapid Transit line constructed and being operated under the franchise of September 4, 1899. The duration of said fran-

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Note (a) In Southern Iowa Electric Co. vs. City of Charleston, 255 U. S. 359, the contract fixed a definite period of time, to wit: 25 years. In the decision the Court said no one would contend that a municipality could make "a valid contract fixing permanent rates."

In Freeport vs. Freeport Water Company, 180 U. S. 578, 600 the contract was for a definite period—30 years.

In Detroit vs. Detroit City R. Co. 134 U. S. 368, the contract was fixed for a certain definite period—30 years.

In Knoxville Water Co. vs. Knoxville, 189 U. S. 434, the Knoxville Water Company contended that there was a municipal rate contract for a definite period of 30 years. However, the Court held that there was not a contract fixing a rate for a definite term and permitted a change in rates.

In Cleveland vs. Cleveland City R. Co. 194 U. S. 519, see pages 535, 536, the contract was entered into in February 1885, and continued until February 1908, 23 years. In the opinion the Court says the provision as to rates of fare were fixed . . . for a stated time.

In Columbus R. Co. vs. Columbus, 249 U. S. 399, the rate contract was for a definite time—25 years.

chise was not extended by the said contract of April 1, 1903. If only the said contract itself is considered, then there is no provision in it that it is to be a perpetual never ending contract.

If it is claimed that no limit as to duration is specified therein; then the rule of law practically universally followed is that such contracts can be terminated after reasonable length of time and upon reasonable notice.

In Jones vs. Newport News & M. Co. 65 Fed. 736, Judge (now Chief Justice) Taft held:

> "The petition makes no better case for the plaintiff on the theory of a contract than on a common law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch on the main line for any definite length of time, or that either expressly agreed to keep it there forever; the plaintiff contends, that, nothing having been said as to the time, the implication is that the switch is to be maintained at all times—forever. Such a construction is quite at variance with the views of the Supreme Court, as expressed in Texas & P. R. Co. vs. City of Marshall, 136 U. S. 393, 10 Sup. Court 846."

Many of the decisions hold that perpetual contracts of this character will not be tolerated, that a court of equity will not compel perpetual performance.

Texas & P. R. Co. vs. Marshall, 136 U. S. 393.

McCullough-Dalzell Crucible Co. vs. Philadelphia Company, 72 Atl. Rep. 633. (Note (b)).

Note (b) In 3 Elliott on Contracts, Sec. 1871, the rule is laid down as follows:

> "Even though there is no express provisions for terminating a contract which is definite in duration and continuous in its nature there is usually an implied option in either party to terminate such a contract as to the part remaining executory."

Barney vs. Indiana Ry. Co. et al 61 N. E. 194.

The decree affirmed by the Supreme Court of the State of Georgia requires perpetual and never ending operation of the line in question under the Decatur municipal rate contract in question. Unless the contract in question requires such perpetual, and never ending operation then under the undisputed facts, the street railway company's property will perpetually be confiscated in contravention of the 14th Amendment of the Constitution of the United States.

This Court has repeatedly held that railroad legislative charters (which are contracts) containing much more imperative terms than the municipal contract in question did not deprive the railroad companies of the constitutional right to cease operation thereunder when future operation was unprofitable.

City of Texas vs. Eastern Texas Rd. Co., 264 U. S. 79 and cases therein cited:

Brooks-Scanlon Co. vs. Railroad Commission 251 U. S. 396; Munn vs. Illinois, 94 U. S. 113.

We respectfully ask the grant of the writ of certiorari in order that this Court may consider and determine for itself whether the City of Decatur municipal rate contract in question compels the street railroad company perpetually to devote its property in the said Municipality to the use of the public; and perpetually compels it to operate therein at a rate of fare not sufficient to pay bare operating expenses.

Turtle Creek Borough vs. Penn Water Co. 99 Atl. 199.

In the case a Borough granted a franchise to a water company providing the company rates for domestic purposes shall not exceed a certain rate. The contract contained no definite limitation as to the time. The court held that it was revocable upon reasonable notice under changed conditions.

Borough of Bellevue vs. Ohio Valley Water Co. 91 Atl. Rep. 236.

Joilet Bottling Co. vs. Joilet Citizens Brewing Co. 98 N. E. 263.

The City of Decatur by virtue of compelled operation of the line in question is also further seeking to impose paving assessments against the street railway company amounting to $14,000 from which the street railway company can receive no benefits. The pleadings show that the street railway company tendered to the Municipality its property located therein along and adjacent to the streets to be paved and its entire street railway property constructed and located within the Municipality of Decatur under the franchise and contract heretofore discussed. The Municipality admits that such property is not worth the amount of the assessment by refusing the tender of such property. We respectfully submit, under the principle of law laid down by this Court in the case of Erie Railroad Company vs. Public Utility Commission 254 U. S. 394, 411, such facts give the street railway company the constitutional right to surrender said franchise or contract in the Municipality and cease operation thereunder. In that case this Court said: "If the burdens imposed are so great that the railroad cannot be run at a profit, it can stop, whatever misfortune the stopping might produce." Certainly the municipal rate contract in question does not deny the street railway company its constitutional right to cease operation under such facts.

The Supreme Court of Georgia cites the case of Fort Smith Light & Traction Company vs. Fargan Bourland, 267 U. S. 300. We respectfully submit that that case is not applicable; the facts in that case were as follows:

The street railway lines within the Municipality of Fort Smith were constructed and operated under a franchise from the Municipality. In 1919 the franchise, together with its obligations and requirements, was, pursuant to a statute of the State of Arkansas, surrendered for an indeterminate permit, the express provisions of which bound the street railway company to operate all its lines within the Municipality unless permitted to abandon a part thereof with leave of the

City Commission, which exercised the powers of a public utility commission. Upon hearing the said commission refused to allow the railway company to abandon a part of a line. Notwithstanding this refusal and its continued operation under the indeterminate permit the street railway company sought to discontinue part of its line. The decision of this Court was that the street railway company by accepting the indeterminate permit had agreed to operate all of its street railway lines and could not, therefore, continue operation thereunder and escape the other burdens which it had agreed to. The concluding paragraph of the said decision is:

"The company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot, in the absence of contract, be compelled to continue to operate its system at a loss. Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S. 396. But the Constitution does not confer upon the company the right to **continue to enjoy** the franchise or indeterminate permit, and **escape from the burdens incident to its use.**" (Italics Ours)

In the case at bar the street railway company is not undertaking to operate within the Municipality of Decatur under the franchise or contract in question; but is seeking to surrender and cease operation thereunder "throughout the City."

Whether the Decatur municipal franchise has been performed, ended, terminated or surrendered or whether perpetual never ending operation thereunder can be compelled is not predicated upon the question whether other lines under other and different municipal franchises are still being operated,

Cleveland E. & R. Co. vs. Cleveland 204 U. S. 116.

The instant suit brought by the Municipality of Decatur seeks to compel perpetual operation under and by virtue of the contract of April 1, 1903. The said contract and franchise are seperate and distinct from the other franchises and street railway lines operated in other municipalities under franchises obtained from them. In fact the franchise in question has been

held to be a separate and distinct classification from all the other lines and franchises of the street railway company.

In Georgia, the Public Service Commission has been given no jurisdiction over this line and neither has it jurisdiction to determine the question of discontinuance of service.

Railroad Commission of Georgia vs. Macon Railway & Light Company, 151 Ga. 256.

The Georgia Public Service Commission has gone as far as it could; it has expressly held that the contract in question fixed a confiscatory rate; and, additionally held that said rate of fare was discriminatory, in so far as all the other lines of the company are concerned. (Original Record page 50. Printed record pages .....).

To require perpetual never ending operation under said conditions would, to use the language of this Court in (194 U. S. 517, 534) lead "to consequences dangerous to public interest, peace and tranquility, the extent of which it would be difficult in advance to see."

Said fact under the decision of this Court in the case of Texas & P. R. Co. vs. Marshall, 136 U. S. 393 is an additional reason why the street railway company should not be compelled to perpetually operate under said contract and should not be denied the right to surrender all its rights thereunder.

It is respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers, in order that it may determine for itself the duration and terminability of the municipal franchise and the municipal rate contract in question and the right of the street railway company to end, terminate or surrender said contracts and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Georgia and finally reverse it.

WALTER T. COLQUITT
BEN J. CONYERS
Counsel for Petitioner

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FILED
JAN 18
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 363

GEORGIA POWER COMPANY

Petitioner

vs.

CITY OF DECATUR

Respondent

BRIEF OF GEORGIA POWER COMPANY

WALTER T. COLQUITT,
BEN J. CONYERS,
Attorneys for Georgia Power Company.

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GEORGIA POWER COMPANY,
Petitioner

vs.

CITY OF DECATUR,
Respondent.

No. 363

Supreme Court
of the
United States

BRIEF OF GEORGIA POWER COMPANY

STATEMENT OF CASE

The City of Decatur (a Municipal corporation of the State of Georgia) brought its equitable petition against the Georgia Railway & Power Company and the Georgia Railway & Electric Company (subsequently consolidated into the Georgia Power Company) to enjoin the street railway companies from ceasing to operate its line (known as Atlanta Rapid Transit Line or the North Decatur Line) within the corporate limits of Decatur. Said suit sought to compel continued, perpetual and never ending street railway operation within said Municipality; founding it exclusively upon a certain Municipal rate contract of April 1, 1903. (See paragraph 31 of the petition; page 75 printed record.)

The petition among other things alleged:

That on the 4th day of September, 1899, the Town of Decatur (now City of Decatur) granted a franchise to "Collins Park & Belt Railroad Company" and that under said franchise the line in question was constructed and being operated; said line being known as Rapid Transit or North Decatur line. (See paragraph 7 of the petition; printed record page 65.)

The Municipality did not allege or claim that said Municipal franchise required perpetual, never ending street railway operation.

The petition alleged that, subsequent to the granting of said franchise and on April 1, 1903, the City of Decatur and

the street railway companies entered into a rate contract wherein the street railway companies agreed to never charge more than five (5) cents for one fare upon the said Rapid Transit line.

That the street railway companies, by proper corporate action, had undertaken to end, surrender or terminate its franchise and contract and to cease any further operation within the Municipality; that in pursuance thereof they had served written notice upon the Municipality that the street railway companies would discontinue street railway operation of said Rapid Transit line on the 30th day of September, 1925. Therefore, the Municipality of Decatur instituted its present equitable action against the street railway companies, to compel continued, perpetual, never ending street railway operation within the Municipality of Decatur, basing its said suit *entirely* upon the Municipal rate contract of April 1, 1903. (See page 75 printed record, paragraph 31 of petition.)

The street railway companies, the Georgia Railway & Power Company and Georgia Railway & Electric Company, (subsequently consolidated into the Georgia Power Company) by answer and cross bill, showed that the street railway line in question, within the Municipality of Decatur, was constructed and being operated under the franchise of September 4th, 1899, granted to "Collins Park & Belt Railroad Company"; said line having been acquired by the Georgia Railway & Electric Company; that on April 1, 1903, the Georgia Railway & Electric Company and the Town of Decatur entered into a rate contract fixing a five (5) cents rate of fare thereon; that neither the franchise nor the rate contract placed a never ending obligation on the street railway company to perpetually operate in Decatur. That the street railway companies, by corporate action, had surrendered, terminated and ended said franchise and rate contract in question, and surrendered all their rights to continue operation thereunder. That the action on the part of the Municipality in refusing to accept such surrender was illegal and unconstitutional. The rate of fare charged under the rate contract was not sufficient to pay bare operating expenses, the cost of rendering the service being two (2) cents per passenger more than the fare it could charge therefor.

That the said rate of fare was both confiscatory and discriminatory. That proper corporate action had ended, terminated and surrendered the Decatur franchise and contract; that they did not require continued and perpetual, never ending street railway operation and that the property of the street railway company would be continually and perpetually confiscated in violation of the 14th amendment of the Constitution of the United States, if the action brought by the Municipality was upheld and the street railway companies restrained from and denied the right to end, terminate and surrender the franchise and contract were not permitted to cease further operation thereunder; that compelled never ending operation would result in never ending confiscation of the property of the street railway companies.

The answer alleged that in former litigation the street railway companies, while continuing to operate under the contract in question, had undertaken to compel the Georgia Public Service Commission to fix a reasonable rate of fare, but that the Supreme Court of the State of Georgia had held that the line in question was a separate and distinct classification from the other lines placed under the Commission's jurisdiction and, that the Public Service Commission had been given no jurisdiction to fix the fare to be charged thereon; that then, the street railway company, while operating under the contract, itself undertook to raise the rate of fare; that said action on the part of the street railway company had been enjoined by the City of Decatur. In this litigation the charter power of the Municipality to enter into a rate contract had been upheld, and it was also held that the said line in Decatur was a separate and distinct classification from the other street railway lines. The right to entirely discontinue the operation of said line in Decatur is involved in the present litigation.

That the City of Decatur had recently secured a charter amendment authorizing it to pave its streets along which the line in question was being operated, and assess paving costs against the street railway company operating thereon. The street railway company had requested the Municipality to relieve it from such burdens. On account of the facts alleged in the answer and cross bill the street railway company could re-

ceive no benefits from said street paving. That the City of Decatur had refused all requests to relieve the street railway company from the paving assessment, and were proceeding to pave said streets; that if the company was compelled to continue operation the City of Decatur would assess an amount of over $14,000 against the street railway company and from the facts (detailed in the answer) such assessment would further confiscate the property of the street railway company in violation of the 14th Amendment of the Constitution of the United States. The answer and cross bill alleged that such assessment gave the street railway company an additional right to cease entire operation within the Municipality of Decatur, as neither the Municipal franchise nor the Municipal rate contract compelled perpetual, never ending street railway operation within the Municipality and the line did not even make operating expenses, without the additional burden of the paving assessment.

The street railway company tendered and offered the City of Decatur its entire street railway line and property located, constructed and operated within the said Municipality under the Municipal franchise or contract in question. (Printed record page 93.)

The street railway company also prayed, in its answer and cross bill, that, under the facts therein set out, the Court declare said contract or franchise ended, terminated, and surrendered and that it be relieved from further operation thereunder.

The case was heard before the Superior Court of DeKalb County upon an agreed statement of facts. The facts set up in the answer and cross bill being introduced and taken as evidence. (Printed record pages 60-61.)

The evidence in the case was undisputed and showed: That the five (5) cents rate of fare was both confiscatory and discriminatory; that continued or compelled operation would confiscate the property of the street railway company without the paving assessment; and, that the paving assessment would occasion further or additional confiscation; that the street railway company had taken proper corporate action terminating,

ending and surrendering all its right to future or further operation within the Municipality of Decatur.

The trial court entered a final decree and adjudged that the street railway companies be and are enjoined as prayed in the petition. (Printed record page 96.) The effect of said decree was to hold, that the Municipal rate contract of April 1, 1903, required perpetual, never ending street railway operation within the Municipality of Decatur; that said rate contract was a perpetual, never ending one and could never be ended, terminated or surrendered by the street railway companies.

The Supreme Court of the State of Georgia, the highest court of the State in which a decision could be had, upheld the decision of the trial court and based its decision exclusively and entirely upon the Municipal rate contract of April 1, 1903. (For this decision see printed record pages 97-103.)

FEDERAL QUESTION INVOLVED

Unless the Municipal rate contract of April 1, 1903, *itself*, compels perpetual never ending street railway operation, and cannot be ended or terminated, the effect of the decision of the Supreme Court of the State of Georgia is to deprive the street railway company of its property without due process of law in contravention of the 14th Amendment of the Constitution of the United States. The admitted and undisputed facts establish the proposition that compelled, continued and perpetual operation requires the street railway company to perpetually render a public utility service at both a confiscatory and discriminatory rate of fare, resulting in continual and never ending confiscation of the property of the street railway company, in violation of the 14th Amendment of the Constitution of the United States; and that such compelled operation will also subject it to other confiscatory burdens in contravention of the 14th Amendment of the Constitution of the United States.

Such constitutional questions being specifically raised, in the case at bar, this Court determines for itself, the extent and duration of the Municipal franchise and rate contract and whether they are still in existence; whether they are perpetual, or whether they have expired, or been performed, terminated or surrendered.

Federal Judicial Code Section 344 (b), (formerly Judicial Code Section 237, as amended by the Act of February 3rd, 1925).

Railroad Commission of Texas vs. Eastern Texas Railroad Company, 264 U. S. 79, 86.

Columbus Railway, Power & Light Company vs. Columbus, 249 U. S. 399, 406, 407.

See also the following cases decided by this Court, in which similar questions to the one involved in the case at bar were brought to this court for review, and the decisions therein rendered by this Court, we respectfully submit, are controlling in favor of the contentions of the Georgia Power Company hereinafter discussed.

Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.

Blair vs. Chicago, 201 U. S. 400.

FORMER LITIGATION

In 1918 the street railway company brought a mandamus suit to compel the Railroad Commission of the State of Georgia (now Georgia Public Service Commission) to assume jurisdiction and fix fares over various street railway lines. The City of Decatur contended that the Decatur Municipal rate fare contract of April 1, 1903, separated it from the other street railway lines and franchises, and that the Georgia Legislative Act of 1907 (Georgia Code Section 2662) conferring jurisdiction upon the Georgia Public Service Commission, had, in its proviso, exempted said line from the commission's jurisdiction.

The Supreme Court of the State of Georgia upheld the said contention of the Municipality of Decatur.

Georgia Railway & Power Company vs. Railroad Commission of Georgia, 149 Ga. 1.

The street railway company itself then sought to change the Decatur rate of fare and notified the City of Decatur that it would charge an increased rate of fare after a certain date. The City of Decatur brought a suit to enjoin such increase, contending that the street railway company had no power or

authority to change its rate of fare; that, while the street railway company continued to operate under the Municipal rate contract, it could not exercise such rights and at the same time escape or relieve itself from the burdens and obligations therein imposed.

In said litigation the questions decided were whether the Municipality of Decatur had charter power to make or enter into a rate contract; and whether the proviso of the Georgia Act of 1907 (Georgia Code Section 2662) made an unreasonable and unconstitutional classification.

The Georgia Supreme Court held that the street railway company was invested with no powers to change its fares; that the Municipality of Decatur had charter powers to enter into a rate contract; that there was no unreasonable classification in exempting the Decatur line in question from the jurisdiction of the Georgia Public Service Commission.

Georgia Railway & Power Company vs. Town of Decatur, 152 Ga. 143; same case in 153 Ga., on final hearing.

Said decision of the Georgia Supreme Court (as to the above questions) was affirmed by this Court.

Georgia Railway & Power Company vs. City of Decatur, 262 U. S. 433.

In said former litigation the power and authority of the parties to enter into a rate contract has been upheld. The record in such former litigation was not introduced in evidence and is not a part of the record in this case, as, what was there adjudicated does not affect the questions here raised.

In the present litigation the power and authority of the parties to enter into a rate contract is not raised, and neither is the street railway company, while continuing to operate under the franchise or contract, undertaking to charge a rate of fare different from that therein provided.

The present litigation involves the right of the street railway company to surrender or terminate the franchise or contract; whether or not it has expired, been terminated or ended; and whether the street railway company can *perpetually* be compelled to operate thereunder at a confiscatory rate of fare.

A similar situation existed in the case of Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116, 130. There it appeared that the Supreme Court of the United States had twice theretofore rendered opinions upholding the validity of the Municipal rate contract, so when the case was again brought before this Court it said: "Therefore, in deciding this case, we assume the validity of the contract whatever it is that was made. The only question involved herein is one of construction and intent." This Court then decided for itself the duration of the various Municipal franchises and rate contracts therein involved.

QUESTION BEFORE THIS COURT FOR ITS DETERMINATION

The facts in the case being undisputed the question for decision by this Court is purely a question of law, to-wit:

Whether the Decatur Municipal franchise of September 4th, 1899, and/or the Decatur Municipal rate contract of April 1, 1903, compelled perpetual, never ending street railway operation within the Municipality of Decatur; and whether the said franchise and contract are such perpetual, never ending contracts as can never be ended, terminated or surrendered by the street railway company?

ASSIGNMENTS OF ERROR

The specifications of error set out in the certiorari, granted by this Court, are as follows, to-wit:

(1) The Supreme Court of the State of Georgia erred in finding and holding that the Municipal rate contract of April 1, 1903, requires perpetual, never ending street railway service within the Municipality of Decatur and that said contract was a perpetual, never ending one.

(2) The Supreme Court of the State of Georgia erred in not holding that the contract of April 1, 1903, had been performed, expired or terminated, or legally surrendered, and erred in holding that said contract could not be terminated, ended or surrendered by the street railway companies ceasing to operate within the Municipality.

(3) The Supreme Court of the State of Georgia erred in not holding that the Municipal rate contract of April 1, 1903, should be construed in connection with the franchise of September 4, 1899, and that said franchise and contract had been performed, expired, terminated or legally surrendered.

(4) The Supreme Court of the State of Georgia erred in not holding and finding that said contract of April 1, 1903, referred and applied to street railway lines as operated under the franchise of September 4th, 1899, and that said contract taken in connection with said franchise, or said Municipal contract taken alone, did not require perpetual, never ending street railway operation within the Municipality of Decatur.

In considering the said assignments of error we first discuss the Municipal franchise of September 4th, 1899, under which the line in question was constructed and operated, although we do not believe, the attorneys for the Municipality will contend that it compelled continued further operation.

THE FRANCHISE UNDER WHICH THE LINE IN QUESTION WAS CONSTRUCTED AND BEING OPERATED HAS EXPIRED AND BEEN TERMINATED BY TIMELY WRITTEN NOTICE.

The line in question was built, constructed and being operated under a franchise from the Town of Decatur to the "Collins Park & Belt Railroad Company." Said Municipal franchise was granted on September 4th, 1899, to "Collins Park & Belt Railroad Company" and was *not* a grant to said Company, *its successors and assigns.*

(See agreed statement of facts, printed record pages 6-8, where the entire franchise is set out.)

In 1900 the name of the "Collins Park & Belt Railroad Company" was changed to "Atlanta Rapid Transit Company."

In 1902 the "Atlanta Rapid Transit Company" conveyed all its property, together with its different lines of street railway to the "Georgia Railway & Electric Company." (See printed record page 13.)

The change of the name of "Collins Park & Belt Railroad

Company" to "Atlanta Rapid Transit Company" and the deed from Atlanta Rapid Transit Company to Georgia Railway & Electric Company are only material as showing the chain of title of the franchise in question into the Georgia Railway & Electric Company.

When, the said franchise had a further duration of over 16 years (and on the 1st day of April, 1903) the Georgia Railway & Electric Company entered into a contract with the Town of Decatur fixing a five (5) cents rate of fare to be charged on said line designated and specifically described in said contract as the Rapid Transit Line.

The franchise in question expired August 16, 1919; *and thereafter continued operation thereunder, since said date, has been similar to a tenancy at will or at sufferance.*

"The Collins Park & Belt Railroad Company" was incorporated under the Acts of the General Assembly approved by the Legislature of Georgia on August 16, 1899.

(See agreed statement of facts, printed record pages 1-5, where the entire Act is set out.)

The duration of its charter was not therein specifically set out, therefore, under the laws of Georgia, its charter expired 30 years from the date of its grant or 30 years from August 16, 1889, i. e. August 16, 1919.

Georgia Code 2215 provides:

> "Corporations have continuous succession during the time limited by their charter, notwithstanding the death of their members. Should any charter granted in future by the General Assembly to a private corporation be silent as to its continuance, such charter shall expire at the end of 30 years from date of its grant."

See also:

West End & Atlanta St. R. Co. vs. Atlanta St. R., 49 Ga. 151 (1).

The Central R. & B. Company vs. State of Georgia, 54 Ga. 404, 420, 422.

The franchise in question granted on September 4th, 1899,

to the "Collins Park & Belt Railroad Company" contained *no* words of grant to its heirs, successors or assigns.

(Printed record, pages 6-8, where the entire franchise is set out.)

Under all the authorities, the duration of such franchise, is for and during the charter life of the Company, therefore, the said municipal franchise of the said Rapid Transit line in Decatur expired August 16, 1919.

Turnpike Co. vs. Illinois, 96 U. S. 63.

Blair vs. Chicago, 201 U. S. 400.

Omaha Electric Light & P. Co. vs. Omaha, 179 Fed. 455 (3), 460.

Wyandotte Elec. Lt. Co. vs. City of Wyandotte, 124 Mich. 43; 82 N. W. 821.

Rockwith vs. St. Road Bridge Co., 108 N. W. 785.

The conveying of this franchise to successive street railway companies did not change its duration, and is immaterial except as showing title thereto.

Virginia Cannon Toll Road Co. vs. People, 22 Col. 429; 37 L. R. A. 711, 718, 719.

Blair vs. Chicago, 201 U. S. 400, see pages 481, 482.

The said Decatur franchise having expired on August 16, 1919; subsequent operation thereunder within the Municipal limits of Decatur constituted a relationship between the said Municipality and the operating street railway company similar to that of a tenancy at will.

Omaha Electric Light & Power Company vs. City of Omaha, 179 Fed. 455 (3), 460.

Detroit United Ry. Co. vs. City of Detroit, 229 U. S. 39, 42.

City and County of Denver vs. New York Trust Co., 229 U. S. 123, 142.

Or a tenancy at sufferance.

Sutton vs. Hiram Lodge, 83 Ga. 770.

Standley vs. Stembridge, 140 Ga. 750 (5), 754, 757.

Crawford vs. Crawford, 139 Ga. 394 (4), 396, 399.

Either of such tenancies can be terminated by either party by reasonable notice.

Denver vs. Denver Union Water Co., 246 U. S. 178, 184.
Western U. Tel. Co. vs. Fain & Parrott, 52 Ga. 19, 22.

On the question of notice see also:

Risley vs. City of Utica, 179 Fed. 885, and cases there cited.

In a tenancy at will or a tenancy at sufferance a party while continuing to occupy the premises cannot escape the burdens incident thereto; but either party can terminate such burdens and put an end to such further, continued relationship by notice.

Kenny vs. Knight, 119 Fed. R. 475 (2).

All the authorities hold that operation under an expired Municipal franchise creates an exactly similar relationship.

See cases heretofore cited.

The street railway companies took proper corporate action terminating and surrendering the franchise in question.

(See printed record pages 42-47.)

Proper and reasonable notice of such action was given to the Municipality, the only party upon whom such notice could be served.

(See printed record pages 42-47.)

The franchise having expired and the holding over having been terminated by due and reasonable notice, it is inconceivable how the City of Decatur can sustain the decree perpetually enforcing continued street railway operation.

It certainly would not be held that a landlord could successfully maintain a suit in equity and by injunction *perpetually* compel a tenant at will or sufferance to continue to occupy his premises because the landlord desired to enjoy for *all time to come* the benefits he was receiving by such continued occupancy. Yet, that is exactly what is done by the decision in question.

We have found no case in conflict with the legal principles just heretofore discussed.

We respectfully submit, that the Supreme Court of Georgia in effect, admits the legal contention just heretofore stated, to-wit; that the franchise in question has expired, terminated and ended; for, that Court in its opinion said "It is not so much the franchise we are dealing with, but the specific contract made in pursuance thereof"; and then based its opinion upon the contract of April 1, 1903.

(See printed record page 101.)

We submit that under a number of decisions of this Court the *duration* of the franchise and the right to surrender it, is decisive of the duration and the right to surrender a contract *made with* reference thereto.

Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116, 130.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.

Blair vs. Chicago, 201 U. S. 400.

The contract of April 1, 1903, in referring to the Rapid Transit line did not undertake to change the duration of the franchise under which said line was being operated or the right of the parties to terminate it or cease operation thereunder.

This Court has repeatedly held that the duration of Municipal franchises and contracts cannot be extended by *implication.*

Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 43, 44.

Blair vs. Chicago, 201 U. S. 401, 471, 474.

MUNICIPAL CONTRACT OF APRIL 1, 1903

Said Municipal rate contract is set out in full on pages 13-19, printed record.

We respectfully submit that an unbroken line of decisions of this Court hold that contracts similar to the Municipal rate contract of April 1, 1903, does not extend the duration of the then existing Municipal franchise.

In cases in which this Court has had Municipal contracts,

(with much broader provisions than those contained in the contract of April 1, 1903) before it for consideration, it has in every case held that such contracts did not extend or enlarge the duration of the former Municipal franchise.

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116.
Detroit U. R. Co. vs. Detroit, 229 U. S. 39.
Blair vs. Chicago, 201 U. S. 400.

In said cases it was the street railway company which contended that certain Municipal contracts (entered into between the street railway company and the Municipality) had the effect of extending the duration of former Municipal franchises; and that under such Municipal contract the street railway company had been given the right and authority to *continue* operation upon the streets in the Municipality. We respectfully submit, that the Municipal contracts under consideration in each of said cases were more susceptible of such construction, than is the Municipal rate contract in the case at bar. Nevertheless this Court, in each case, held, that under the principle of law as repeatedly announced by it, it was impossible to hold that the Municipal contract extended the duration of the franchise and therefore the street railway company only had the right to operate within the Municipality for and during the franchise period. For instance see the case of Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 43-45 (where former cases of this Court are quoted and discussed). It is, of course, immaterial, that in the case at bar, it is the street railway company which contends that the Municipal rate contract in question does not extend the duration of its franchise; and that, therefore, under such Municipal rate contract it cannot be required to render perpetual, never ending operation and service.

Such Municipal rate contracts are to be similarly construed, whether the street railway company is contending that it has the right to further operate thereunder, or is denying the Municipality's right to compel never ending operation thereunder.

Applying the principle of law (as announced in the cases of this Court just heretofore cited) to the Municipal rate contract involved in the case at bar, then as held by this Court in

the case of Denver vs. Denver Union Water Company, 246 U. S. 178, 184: "It is a necessary corollary that the Company may discontinue its service at will."

The Municipal rate contract of April 1, 1903, did not *expressly or by implication* extend the duration of the franchise, under which the line in question was constructed and being operated within the City of Decatur, and did not and could not affect franchises from other Municipalities.

This contract first deals with discontinuance and removal from the streets of Decatur of a line of track known as the Atlanta Railway Company and required the street railway company upon such removal to restore the surface of the streets in good condition. There is no contention that the franchise of the Atlanta Railway Company in Decatur had not expired long prior to the present litigation. The discontinuance of the Atlanta Railway Company's line 26 years ago (in 1903) does not affect the duration of the franchise of the Atlanta Rapid Transit line.

The other parts of the said contract by actual terms and description relate and refer to "Atlanta Rapid Transit Line." There is not a word or line which, either *expressly or by implication*, deals with or undertakes to extend the duration of the franchise of said Rapid Transit Line. The *length* of time said line *must* operate in Decatur is not extended. When the contract of April 1, 1903, was made it did not and was not intended to cover or deal with such questions. The Decatur Municipal franchise, under which the Atlanta Rapid Transit Line was being operated had not expired; by its own terms it was to continue for a further duration of 16 years. The said contract of April 1, 1903, was not intended to and did not (either expressly or by implication) undertake to modify, enlarge or change, or deal with that question.

We respectfully submit that the contract of April 1, 1903, in no way changed the duration of the Municipal franchise of Atlanta Rapid Transit Company line (heretofore discussed) or the rights of the parties with reference to its termination or surrender.

The Supreme Court of Georgia largely relied upon the ex-

pression of the contract "to never charge more than five cents for one fare."

The provision of the contract is "to never charge more than five cents for one fare, upon *its Decatur line* above referred to as the *Rapid Transit Line.*" (The said line in Decatur is then described in detail.)

It will be seen that said provision or contract as to the rate of fare was made with reference to the line already constructed and in operation. It fixed the rate of fare while the line was operating. Such provision did not undertake to compel perpetual and never ending operation.

This exact question was before this Court in the case of Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116, in which it was held that the Municipal rate contract did not change the duration of the franchise.

See also:

Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 43, 44, 45.

In Charleston-Isle of Palms Traction Co. vs. Shealey, 266 Fed. Rep. 406, the Court held that a five (5) cents rate of fare was fixed by contract; and that the street railway company was bound thereby while it operated thereunder; but, also further held; that the street railway company had the constitutional right to cease operation thereunder and thus avoid the confiscatory rate.

As to such right to discontinue operation, see also:

Railroad Commission of Texas vs. Eastern T. R. Co., 264 U. S. 79, 85, 86.

In the case of Brooks-Scanlon Co. vs. Railroad Commission of La., 251 U. S. 396, this Court held: "A carrier cannot be compelled to carry on even a branch of business at a loss."

In the case of State of Iowa vs. Old Colony Trust Company, 215 Fed. 307, 313 (cited approvingly by this Court in many cases), the Court held that "A railroad company may abandon an unprofitable and irreclaimable part of its road and neither the State nor unfortunate investors along the line can justly complain."

In the case of Munn vs. Ilinois, 94 U. S. 113, 192, this Court said:

> "The grantor may withdraw his grant by discontinuing the use; but so long as he maintains its use, he must submit to the control."

To the same effect see:

Erie Railroad Co. vs. Board of Public Utility Commissioners, 254 U. S. 394, 411.

It has been repeatedly held that a street railway company can surrender such a franchise as the one in question to the Municipality which granted it.

Stiles vs. Citizens Electric Street Railway Co., 19 L. R. A. (N. S.) 865; 199 Mass. 294, 85 N. E. 419.

State of Montana & Knight vs. Power Company, 44 L. R. A. 692; 22 Montana 391; 65 Pacific 685.

San Antonio Street Railway Company vs. State of Texas, 35 L. R. A. 662; 30 S. W. 926.

Charleston-Isle of Palms Traction Co. vs. Shealey, 266 Fed. 406.

Southern Bell Tel. & Tel. Co. vs. Railroad Commission of South Carolina, 280 Fed. Rep. 901, 902 (7).

Gilschrist vs. Waycross Street & Suburban Railroad Co., 246 Fed. Rep. 952.

The Supreme Court of the State of Georgia said:

> "When this contract was before the Supreme Court of the United States (262 U. S. 438 supra) the Court said with reference to the duration of this contract, 'that this contract would remain effective until there should be conflicting legislative action'."

That case arose over an endeavor on the part of the street railway company, while operating under the franchise to change the contract rate of fare as added to the franchise by the contract of April 1, 1903. The street railway companies had served notice on the Municipality of Decatur that on and after October 20, 1920, it (the street railway company) would charge a seven (7) cents rate of fare on the said North Decatur or Rapid Transit Line. The Municipality of Decatur then brought an equitable suit to enjoin the street railway company, while

operating under the franchise in Decatur, from changing the rate of fare, as provided in the contract. In answer to such suit the street railway company contended lack of power and authority in the Town of Decatur to make a rate contract; that the rate of fare provision was not a contract.

The decision of this Court shows that it was dealing with such questions and not with the right of the *Municipality to compel perpetual, never ending operation thereunder.*

The question there decided is entirely different from the one involved in the present litigation. As controlling on this question see:

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116, 130.

The Supreme Court of the State of Georgia says that the contract of April 1, 1903, if not expressly, *impliedly* gives consent to the operation of the line in question within the Municipality.

The provision of the contract to which the Supreme Court of Georgia was referring is as follows:

> "To gradually from time to time, as it may obtain permission so to do and may have funds available for such purpose, double track said Rapid Transit Line from terminus to terminus, the loop already being described in the Town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years in the event it can obtain permission to construct said double track, which said double track, when completed shall be maintained in a substantial, safe and expeditious manner and shall be operated with cars and rolling stock kept in safe and comfortable condition. Permission to construct said double track in the Town of Decatur is hereby granted."

That such and similar provisions do not extend the duration of the franchise (the franchise of September 4, 1899, heretofore discussed) was held by this Court in Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116.

See also:

Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 44, 45.

Blair vs. Chicago, 201 U. S. 400.

The said provision of the contract was not an undertaking on the part of the parties to change or affect the duration of the franchise under which the line was being operated.

The agreed statement of facts show that no double track was laid within the Municipality of Decatur under it; however, this is immaterial for as held in the Cleveland case (204 U. S. 116, 137-140), a right given to construct an additional track would not extend the duration of the franchise under which the single line has been constructed. In fact, the contract in question, provides that the loop in Decatur (as already constructed) was to be considered a double track. Nothing said in said contract was intended to affect the duration of franchises received from other Municipalities. While operating, a legal duty rests upon the company to maintain its tracks in a safe and expeditious manner and to keep its cars and rolling stock in good and comfortable condition. This, however, does not compel perpetual, never ending operation at a loss.

State of Texas vs. Eastern Texas R. Co., 264 U. S. 79, 85.

Also see:

Texas & P. R. Co. vs. Marshall, 136 U. S. 393.

Jones vs. Newport News, 65 Fed. 736, 741 (2).

Texas & P. R. Co. vs. Scott, 77 Fed. 726 (2), 730.

In the case of Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116, 133, the grants then being considered by this Court specifically referred to lines which were to be operated in connection with other and different lines. Nevertheless this Court held that such reference did not have the effect of extending the duration of any line, though the lines referred to had franchises of longer duration.

Let us assume that on September 4th, 1899, the City of Decatur, as landlord, had rented certain of its property to a person, as lessee. The lease provided that said property was to be used for hotel purposes and that the duration thereof was for a period of 30 years. Subsequent thereto and on April 1, 1903 (sixteen years prior to the expiration of said lease), the landlord and tenant had entered into a contract with reference to said hotel property; by which the tenant, for a valuable con-

sideration, agreed "to never charge its guests more than a rate of $1.00 per room"; and also agreed "to put an elevator in the hotel and from time to time paint or repaper the rooms, and to maintain and operate the hotel in a safe and comfortable manner"; certainly such supplemental contract, of April 1, 1903, would not be held to change the duration of the original lease and convert it into a perpetual, never ending one. Such supplemental contract of April 1, 1903, would be taken and construed in connection with the duration of the original lease.

Occupancy of the premises by the tenant, after the expiration of the lease, would, of course, subject the tenant to the burdens or obligations incident to such continued occupancy. However, such continued occupancy would not give the tenant the legal right to claim a perpetual, never ending lease. Similarly, the landlord could not require the tenant to perpetually continue as his tenant because he occupied the premises, after the expiration of the lease.

Under the authorities heretofore cited, such continued occupancy constituted a tenancy at will or at sufferance, and can be terminated by *either party* by reasonable notice.

This Court has repeatedly held that contracts similar to the contract of April 1, 1903 (involved in the case at bar), did not give the street railway company the right of perpetual, continued and never ending operation upon the streets of the Municipality and did not have the effect of extending the duration of a former Municipal franchise.

Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 44, 45.

Blair vs. Chicago, 201 U. S. 400.

See also cases cited under the next head of this brief.

It follows, as a corollary, that if the street railway company cannot successfully claim that such a contract gives it the right to perpetual, never ending operation upon the streets of the Municipality; then the Municipality (basing its action on the same or a similar contract) cannot compel the street railway company to continual, perpetual, never ending street railway operation.

THE PRINCIPLE OF LAW REPEATEDLY ANNOUNCED BY THIS COURT IN CONSTRUING MUNICIPAL CONTRACTS

This Court has repeatedly held that Municipal rate contracts do not compel perpetual and never ending operation.

In the case of Texas & P. R. Co. vs. Marshall, 136 U. S. 393, this Court held; that a Municipal contract providing that in consideration of certain donations made by the City, a railroad agreed that it would *permanently* establish its terminus in the City was performed by maintaining it there for eight years.

Certainly, under the undisputed facts in the case at bar, the street railway company cannot be compelled to perpetually operate under the Municipal rate contract in question.

In the case of Home Telegraph & Tel. Co. vs. City of Los Angeles, 211 U. S. 265, this Court expressly held that Municipalities possessing the power and authority to make rate contracts can only make them for a definite time "not grossly unreasonable in point of time." In subsequent decisions this Court has restated and followed that legal principle. (For illustration see cases cited in note [a].)

R. R. Commission of Cal. and City of Los Angeles vs. Los Angeles Ry. Corp., rendered Dec. 2nd, 1929.

Note (a) In Southern Iowa Electric Co. vs. City of Chariton, 255 U. S. 359, the contract fixed a definite period of time, to-wit: 25 years. In the decision the Court said no one would contend that a Municipality could make "a valid contract fixing permanent rates".

In Freeport vs. Freeport Water Company, 180 U. S. 578, 600, the contract was for a definite period—30 years.

In Detroit vs. Detroit City R. Co., 134 U. S. 368, the contract was fixed for a certain definite period—30 years.

In Knoxville Water Co. vs. Knoxville, 189 U. S. 434, the Knoxville Water Company contended that there was a Municipal rate contract for a definite period of 30 years. However, the Court held that there was not a contract fixing a rate for a definite term and permitted a change in rates.

In Cleveland vs. Cleveland City R. Co., 194 U. S. 519, see pages 535, 536, the contract was entered into in February, 1885, and

The contract of April 1, 1903, was made with reference to the Rapid Transit line constructed and being operated under the franchise of September 4, 1899. The duration of said franchise was not extended by the said contract of April 1, 1903. If only the said contract itself is considered, then there is no provision in it that it is to be a perpetual, never ending contract.

If it is claimed that no limit as to duration is specified therein; then the rule of law practically universally followed is that such contracts can be terminated after reasonable length of time and upon reasonable notice.

In Jones vs. Newport News & M. Co., 65 Fed. 736, Judge (now Chief Justice) Taft held:

> "The petition makes no better case for the plaintiff on the theory of a contract than on a common law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch on the main line for any definite length of time, or that either expressly agreed to keep it there forever; the plaintiff contends, that, nothing having been said as to the time, the implication is that the switch is to be maintained at all times—forever. Such a construction is quite at variance with the views of the Supreme Court, as expressed in Texas & P. R. Co. vs. Marshall, 136 U. S. 393; 10 Sup. Court 846."
> See also cases in Note (b).

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continued until February, 1908, 23 years. In the opinion the Court says the provision as to rates of fare were fixed...for a stated time.

In Columbus R. Co. vs. Columbus, 249 U. S. 399, the rate contract was for a definite time—25 years.

Note (b) In 3 Elliott on Contracts, Sec. 1871, the rule is laid down as follows:

"Even though there is no express provisions for terminating a contract which is indefinite in duration and continuous in its nature, there is usually an implied option in either party to terminate such a contract as to the part remaining executory."

Barney vs. Indiana Ry Co. et al., 61 N. E. 194.

Turtle Creek Borough vs. Penn. Water Co., 99 Atl. 199.

Many of the decisions hold that perpetual contracts of this character will not be tolerated, that a court of equity will not compel perpetual performance.

Texas & P. R. Co. vs. Marshall, 136 U. S. 393.

McCullough-Dalzell Crucible Co. vs. Philadelphia Company, 72 Atl. Rep. 633.

The decree affirmed by the Supreme Court of the State of Georgia requires perpetual and never ending operation of the line in question under the Decatur Municipal rate contract of April 1st, 1903. Unless such contract requires such perpetual, and never ending operation, then under the undisputed facts, the street railway company's property will perpetually be confiscated in contravention of the 14th Amendment of the Constitution of the United States.

This Court has repeatedly held that railroad legislative charters (which are contracts), containing much more imperative terms than the Municipal rate contract in question, did not deprive the railroad companies of the constitutional right to cease operation thereunder, when future operation was unprofitable.

State of Texas vs. Eastern Texas R. Co., 264 U. S. 79 and cases therein cited.

Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S. 396; Munn vs. Illinois, 94 U. S. 113.

In that case a Borough granted a franchise to a water company providing the company rates for domestic purposes shall not exceed a certain rate. The contract contained no definite limitation as to the time. The Court held that it was revocable upon reasonable notice under changed conditions.

Borough of Bellevue vs. Ohio Valley Water Co., 91 Atl. Rep. 236.

Joliet Bottling Co. vs. Joliet Citizens Brewing Co., 98 N. E. 263.

In Michigan Mutual Life Ins. Co. vs. Thompson, 266 Fed. 973, (3) (a decision by the Second Circuit Court of Appeals) the Court says:

"The general rule is that contracts not expressly made for a fixed period are terminable at the will of either party."

See also:

Chattanooga R. & C. R. Co. vs. Cincinnati, N. O. & T. P. Ry. Co., 44 Fed 456 (3).

The City of Decatur by virtue of compelled operation of the line in question is also further seeking to impose paving assessments against the street railway company amounting to $14,000 from which the street railway can receive no benefits. The pleadings show that the street railway company tendered to the Municipality its property located therein along and adjacent to the streets to be paved and its entire street railway property constructed and located within the Municipality of Decatur under the franchise and contract heretofore discussed. The Municipality admits that such property is not worth the amount of the assessment by refusing the tender of such property. We respectfully submit, under the principle of law laid down by this Court in the case of Erie Railroad Company vs. Public Utility Commission, 254 U. S. 394, 411, such facts give the street railway company the constitutional right to cease operation within the Municipality. In that case this Court said: "If the burdens imposed are so great that the railroad cannot be run at a profit, it can stop, whatever misfortune the stopping might produce." Certainly the Municipal rate contract in question does not deny the street railway company its constitutional right to cease operation under such facts.

The Supreme Court of Georgia cites the case of Fort Smith Light & Traction Company vs. Fargan Bourland, 267 U. S. 300. We respectfully submit that the case is not applicable; the facts in that case were as follows:

The street railway lines within the Municipality of Fort Smith were constructed and operated under a franchise from the Municipality. In 1919 the franchise, together with its obligations and requirements, was, pursuant to a statute of the State of Arkansas, surrendered for an indeterminate permit; the express provisions of which bound the street railway company to operate *all* its lines within the Municipality unless permitted to abandon a part thereof with leave of the City Commission, which exercised the powers of a public utility commission. Upon hearing, the said commission refused to allow the railway company to abandon *a part of a line.* Notwithstanding this refusal and *its continued operation under the indeterminate permit* the street railway company sought to

discontinue *part of its line.* The decision of this Court was that the street railway company by accepting the indeterminate permit had agreed to operate all of its street railway lines and could not, therefore, continue operation thereunder and escape the other burdens which it had agreed to. The concluding paragraph of the said decision is:

> "The company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot, in the absence of contract, be compelled to continue to operate its system at a loss. Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S. 396. But the Constitution does not confer upon the company the right to *continue to enjoy* the franchise or indeterminate permit, and *escape from the burdens incident to its use.*"

In the case at bar the street railway company is not undertaking to operate within the Municipality of Decatur under the franchise or contract in question; but is seeking to surrender and cease operation thereunder "throughout the City."

Whether the Decatur Municipal franchise has been performed, ended, terminated or surrendered, or whether perpetual, never ending operation thereunder can be comeplled is not predicated upon the question whether other lines under other and different Municipal franchises are still being operated.

Cleveland E. & R. Co. vs. Cleveland, 204 U. S. 116.

The instant suit brought by the Municipality of Decatur seeks to compel perpetual operation under and by virtue of the contract of April 1, 1903. The said contract and franchise are separate and distinct from the other franchises and street railway lines operated in other Municipalities under franchises obtained from them. In fact the franchise in question has been held to be a separate and distinct classification from all the other lines and franchises of the street railway company.

In Georgia, the Public Service Commission has been given no jurisdiction over this line and neither has it jurisdiction to determine the question of discontinuance of service.

Railroad Commission of Georgia vs. Macon Railway & Light Company, 151 Ga. 256.

The Georgia Public Service Commission has gone as far as it could; it has expressly held that the contract in question fixed a confiscatory rate; and, additionally held that said rate of fare was discriminatory, in so far as all the other lines of the company are concerned.

Printed record page 42.

To require perpetual, never ending operation under said conditions would, to use the language of this Court in 194 U. S. 517, 534, lead "to consequences dangerous to public interest, peace and tranquillity, the extent of which it would be difficult in advance to see."

Said fact under the decision of this Court in the case of Texas & P. R. Co. vs. Marshall, 136 U. S. 393, is an additional reason why the street railway company should not be compelled to perpetually operate under said contract and should not be denied the right to surrender all its rights thereunder.

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Attorneys for Georgia Power Company.

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CHARLES ELMORE C

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Supreme Court of the United States

OCTOBER TERM, 1929

No. 363

GEORGIA POWER COMPANY

Petitioner

vs.

CITY OF DECATUR

Respondent

REPLY BRIEF OF GEORGIA POWER COMPANY

WALTER T. COLQUITT,

Attorney for Georgia Power Company.

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GEORGIA POWER COMPANY,
Petitioner

vs.

CITY OF DECATUR,
Respondent.

No. 363

Supreme Court
of the
United States

REPLY BRIEF OF GEORGIA POWER COMPANY

It is respectfully submitted that the brief of respondent does not answer any of the legal principles upon which the Georgia Power Company relies.

The power or authority of a municipality to make a rate contract, for a reasonable term of years, not grossly excessive, is not involved.

That this Court is bound by the decisions of the highest Courts of the State as to the power of their municipalities, is not contested or involved.

If the municipal rate contract in question is perpetual and has not expired, and cannot be ended, terminated or surrendered, that the rate therein specified is confiscatory, does not relieve the street railway company from its obligation to serve at the rate therein specified.

> Railroad Commission vs. Los Angeles Rd. Corporation, decided December 2nd, 1929, 74 L. Ed. 113.

The contention of the Georgia Power Company is that the municipal franchise or rate contract in question has been fully performed, has expired, been ended, or terminated or surrendered. It no longer creates a contractual obligation compelling perpetual operation thereunder. The question of the duration and the construction of a municipal franchise or contract is one of general law. Compelling continuous and perpetual operation at the 5 cents rate of fare specified requires continuation of service at an undisputed, discriminatory and confiscatory rate of fare.

The facts set out and stated in the answer filed by the Georgia Power Company are undisputed evidence in the case.

(See record pages 60 and 61.)

That the contract in the case at bar has been fully performed, and has been ended, terminated or surrendered, was discussed in our original brief and will not be repeated.

(See original brief pages 9-20.)

Following the principles announced in said decisions there is no longer any contractual obligations (under the municipal franchise in question) compelling further or continued street railway operation. Therefore, such continued and compelled operation at the discriminatory and confiscatory rate of fare confiscates the property of the street railway company in violation of the 14th Amendment of the Constitution of the United States.

In determining the duration of municipal franchises, or rate contracts, this Court has repeatedly held that their duration cannot be extended by implication. This rule of law is applicable to Georgia contracts for it has been enacted into the statutory law.

Georgia Code Section 3809 provides:

> "A grantee . . . . . of a franchise takes nothing by implication."

In contending that this legal principle is not applicable to the municipal franchise or rate contract in question, respondent's brief takes positions in direct conflict with the allegations upon which its suit is predicated and founded and contends that the Municipality of Decatur had no power or authority to grant a franchise, and that the rate contract in question is no more or less than a private contract.

For instance, on page 21 of respondent's brief it is stated "Towns have nothing in the nature of a franchise to give." Again, on page 49, "The City does not give any franchise at all." The contract in question is no more or less than a private contract, is argued at length in respondent's brief.

(See pages 33-39 respondent's brief.)

Such contention is in direct conflict with the allegations in the instant suit. See the following portions of the record.

Paragraph 7 of the petition, record page 65.)

(Agreed statement of fact No. 3, pages 6, 7 and 8 of the record) where the municipal franchise is set out and it is stated, "This is the line in question in this suit."

Taking the contract in question as no more or less than a private contract, the rate therein fixed is subject to change by the Georgia Public Service Commission.

Union Dry Goods Co. vs. Georgia Public Service Commission, 142 Ga. 841, 846. Affirmed by this Court in 248 U. S. 372.

Producers Transportation Company vs. Railroad Commission, 251 U. S. 228, 232.

In former litigation between the parties this Court held that the contract and line in question was a reasonable, separate and distinct classification.

Georgia Railway & Power Company vs. Town of Decatur, 262 U. S. 438.

Considering the municipal contract in question as no more or less than a private contract, it is not a perpetual one.

CONTRACT CASES RELIED UPON BY RESPONDENT

Respondent relies upon two cases.

The contract, in each of these cases shows either a joint interest in the property itself, or a joint interest in an enterprise, or a joint enterprise.

For instance, in Franklin Telephone Company vs. Harrison, 145 U. S. 459, the facts showed that Harrison & Company itself constructed and built, at its own expense, a certain telegraph wire, which it was to own absolutely for a period of ten years. After this ten year period the ownership of this line was to pass to the telegraph company. Under the contract the title to the said property passed with the express reservation "that its use by Harrison & Company after ten years 'should

be upon the same terms in all other respects as if the wire *had not been* given up.' "

(See page 470 of the 145 U. S.)

This Court held that said contract requirement "can only be met by according to appellees (Harrison & Company) . . . . the same absolute right of use they enjoyed before the wire was given up to the company," and then calls attention to other provisions of the contract which would only accord with such construction.

In Western Union Company vs. Pennsylvania, 129 Fed. Rep. 849, the Court held that the contract created a joint enterprise. (See page 865 of 129 Fed. Rep.) A joint interest of the contracting parties in the telegraph wire, the property itself and its maintenance was also shown.

The facts, in each of the cases cited in said opinion, show that the particular contract being considered, either created a joint interest in the enterprise or a joint interest in the property.

Such contracts are essentially different from service contracts, fixing a rate to be paid therefor.

The cases relied upon by respondent are distinguished by the Supreme Court of Pennsylvania in McCullough-Dalzell Crucible Co. vs. Philadelphia, 223 Pa. 343, 72 Atl. 636, holding that a company agreeing to furnish natural gas in consideration of right of way may terminate contract on proper notice.

The contract in the case at bar does not come within the class of contracts which creates a joint interest in property or a joint interest in an enterprise, or which creates an enterprise.

The Georgia Power Company is not undertaking to keep the Municipality of Decatur from exercising dominion over or from using its streets. The contract does not give the municipality a joint property right in any property of the street railroad company. Under it the Municipality of Decatur and the Georgia Power Company have entered into no joint enterprise.

Furthermore, whether the contract in question be taken as a municipal franchise or as a private contract, under the law

of the State of Georgia which limited the charter of the Collins Park & Belt Railroad Company to thirty years, the franchise or contract made with said company, and which contained no words of succession or assigns, was by its very terms limited to thirty years' duration. It follows that the rate contract of April 1, 1903, made with reference to said Collins Park & Belt Railroad Company line did not change the duration of the franchise *or contract.*

(This question is discussed in our original brief, pages 9-20.)

ISSUE AS TO PERPETUITY

Respondent's brief asserts that the question of perpetuity of the contract is not involved. (See respondent's brief pages 51-57.)

There is no merit in this contention.

An equitable suit was brought by the City of Decatur against the street railway company to enforce perpetual, never ending operation of the line in question. Its said suit was solely and entirely based upon the municipal rate contract of April 1, 1903. The petition alleged that this contract was not only a subsisting and continuing contract, but was one that had not terminated and could not be ended, terminated or surrendered.

(See paragraph 18 of the complaint, record page 70.)

(See paragraph 25 of the complaint, record page 73.)

(See paragraph 31 of the complaint, record page 71.)

(See paragraph 33 of the complaint, record pages 75 and 76.)

The prayers of the petition specifically asked that the defendant be "permanently" enjoined;

From violating the provision of the contract; from ceasing to maintain and operate the line under the contract; from abandoning the line; from in any way carrying out the notice to terminate or end the contract; that defendant be decreed

to have no right, power or authority to surrender or terminate the franchise or cease operation thereunder.

(See prayers of the petition set out on page 76 of the record.)

The prayers of the petition specifically asked that the defendant be *permanently* or perpetually restrained in each and every one of the above particulars. The judgment and decree of the court was "that defendant in said case be and is hereby *enjoined* as *prayed for* in the petition."

(See record page 61, and again on page 96, where the decree is set out.)

The decree held that the contract was perpetual and could not be surrendered or terminated.

Respondent's brief suggests that the duration of the contract be taken as the corporate life of the Georgia Railway & Electric Company and not the corporate life of the Collins Park & Belt Railroad Company. This question was argued in our original brief.

(See original brief pages 13-20.)

In addition to what was there said, the agreed statement of facts shows that the corporate life of the Georgia Railway & Electric Company and the Georgia Railway & Power Company ended and terminated when they, with other corporations, were consolidated into the Georgia Power Company.

(See agreed statement of fact No. 9, record pages 36-37.)

Railroad Co. vs. State of Georgia, 95 U. S. 359.

State vs. Atlanta R. Co., 60 Ga. 268.

Carswell vs. National Exchange Bank, 165 Ga. 351, 357.

ARGUMENT IN RESPONDENT'S BRIEF THAT THE LINE IN QUESTION SHOULD BE OPERATED BY VIRTUE OF CHARTER PROVISIONS

There are many complete answers to this contention.

(1) The present suit is not predicated upon any claimed

charter requirement, but is based exclusively and entirely upon an alleged municipal franchise or contract.

(See paragraphs 7, 12, 18, 31 and 33 of the complaint, pages 56, 57, 70, 75, 76 of the record.)

(2) The charter of the Collins Park & Belt Railroad Company has expired.

(3) The corporate existence of the Georgia Railway & Electric Company and the Georgia Railway & Power Company was terminated by their consolidation with other corporations into the Georgia Power Company.

(Agreed statement of fact No. 9, record pages 36-37.)

(4) The charters of said companies were merely permissive charters and need not be surrendered.

State of Texas vs. Eastern Texas Rd. Co., 264 U. S. 79.

(5) There are no charter obligations compelling the Company to operate the line in question.

(See page 9 of the record.)

(6) If the present suit had been based upon charter obligations (instead of upon the alleged municipal franchise or contract) the municipality could not compel continued operation at the 5 cents rate of fare. This Court has held that where a municipality is seeking to compel continued operation under charter obligations and the charter does not provide for the rate of fare, it cannot compel operation at a fare so low as to require operation at a loss.

Detroit & R. Co. vs. Detroit, 248 U. S. 429.

City of Lincoln vs. Lincoln Home Tel. Co., 279 Fed. 949 (1), 952 (1), and cases therein cited.

OTHER QUESTIONS DISCUSSED IN RESPONDENT'S BRIEF APPLY TO QUESTIONS OF STATE PRACTICE

Under our view of the law this Court is not concerned with these questions, but as they have been discussed at great

length in respondent's brief, we take the liberty of replying and showing that there is no merit in the argument.

ASSIGNMENTS OF ERROR CARRYING CASE TO THE SUPREME COURT OF THE STATE OF GEORGIA WERE SUFFICIENT

In respondent's brief pages 32-35; pages 74-84; it is argued that the assignments of error, carrying the case to the Supreme Court of the State of Georgia, are insufficient.

The case at bar was an equitable suit brought by the City of Decatur against the Georgia Power Company based upon a certain claimed municipal rate contract. In answer to said suit the Georgia Power Company contended that said municipal rate contract had been ended, terminated and surrendered by timely written notice. In the final hearing of the case the trial court passed upon both the law and the facts and rendered a decree enjoining the defendant as prayed in the petition.

The decree, as rendered, is set out on pages 61 and 96 of the record.

The assignments of error, in the Georgia Bill of Exceptions are found on page 61 of the record.

That such assignments of error are sufficient under the Georgia practice is shown by the following cases.

In the case of Atlanta Railway & Power Company vs. Atlanta Rapid Transit Company, 113 Ga. 481, it was held that an assignment of error upon an order granting or denying an injunction, as follows "to which order the plaintiff excepted and now excepts and assigns the same as error, in that it is contrary to law and evidence in the case" is a sufficient assignment of error.

In the case of Kirkland vs. Atlantic Birmingham Railway Co., 126 Ga. 246, the Court held: where a Court determines a case and passes upon both the law and the facts as "a party can not compel a Judge, in such a hearing, to pass separately on questions of law and fact. . . . . The losing party can not

well complain of specific rulings, if the Judge made none." The assignment of error in that case, to wit: "To which said judgment refusing and denying the temporary injunction prayed the said plaintiffs then and there excepted, and now except and assign the same as error, and say that the Court erred in not granting the temporary injunction as prayed by the plaintiffs in their petition", was sufficient.

It is not necessary to multiply decisions on this question. Georgia Code Section 6183 provides:

> "It shall be unlawful for the Supreme Court of Georgia to dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to that Court, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein."

For the construction placed upon this Section by the Supreme Court of Georgia, see

Colquitt County vs. Bahnsen, 162 Ga. 340, 344, 345.

ISSUES RAISED BY PLEADINGS

Respondent's brief (pages 34 and 35) says that the answer of defendant did not raise the question sought to be reviewed.

There is no merit in such contention.

The equitable suit brought by the City of Decatur sought to compel the Georgia Power Company to perpetually operate under the alleged municipal rate franchise of April 1, 1903. The petition alleged that said contract of April 1, 1903, is a valid subsisting and binding contract upon defendant.

(See paragraph 18 of the petition, record page 70.)

The petition alleged that the defendant sought to end, terminate or surrender the contract and on the 26th day of September, 1925, after corporate action, notified petitioner that the contract was ended, terminated or surrendered and that

the street railway company would cease any further or continued operation thereunder.

(See paragraph 23 of the petition, record page 73.)

The petition set out and contended that the defendant could not end, terminate or surrender the franchise.

(See paragraph 25 of the petition, record page 73.)

(See also paragraph 26 of the petition, record page 73.)

The petition specifically alleged that the suit was based upon the rate contract in question.

(Paragraph 31 of the petition, record page 75.)

The petition alleged that operation of the street railway line in question must be maintained and continued without any interruption, under the contract of April 1, 1903.

(See paragraph 33 of the petition, record pages 75 and 76.)

Defendant in its answer specifically denied the 18th, 25th, 26th and 33rd paragraphs of the petition.

(See paragraph 2 of the answer, record page 79.)

Answering paragraph 23 of the petition it admitted that its Board of Directors had passed resolutions declaring the franchise ended, terminated and surrendered, and that the copies attached to the petition were correct.

(See paragraph 1 of the answer, record page 79.)

In answer to the 24th paragraph of the petition which alleged that the City of Decatur refused to accept the termination, ending and surrender of the franchise (record page 73) the defendant alleged that the surrender of the franchise was complete and effective without any action on the part of the Municipality; that defendant was no longer bound to operate thereunder.

(See paragraph 7 of the answer, record page 79.)

In answer to the 31st paragraph of the petition defendant denied the right of petitioner to bring the action referred to

in said paragraph and denied that plaintiff was entitled to any of the rights mentioned in said paragraph.

(See paragraph 9 of the answer, record page 80.)

The answer set out in detail the costs of continued operation of the line in question and showed that it actually costs 8.70 cents to haul a passenger who was only required to pay the sum of 5 cents. That the defendant should not be required to continue further operation under a contract, which had been ended, terminated, or surrendered; that compelled continued operation would unconstitutionally confiscate petitioner's property in violation of the 14th Amendment of the Constitution of the United States.

(See paragraph 16 of the answer, record pages 83-84; also paragraph 25 of the answer, record page 94.)

The answer specifically denying each and every one of the allegations thus made in the petition is sufficient, under the Georgia practice, and is not merely "a plea of the general issue" as argued in respondent's brief.

Georgia Code Section 5634, among other things, provides:

That a defendant "may in a single paragraph deny any or all of the allegations of the petition."

Such denial is sufficient.

Ocean Steamship Co. vs. Anderson, 112 Ga. 835 (1), 836.

DeSoto Plantation Company vs. Hammett, 111 Ga. 24.

Such a denial "places upon the plaintiff the burden of proving the allegations as made."

Supreme Lodge Knights of Pythias vs. Crenshaw, 129 Ga. 195 (3), 202 (3).

See also Georgia Code Section 5539.

The suggestions made in respondent's brief that the questions brought to this Court for review first originated in the petition for certiorari to this Court are without merit. We do not see that this question is at all material, but if it is, we ask the permission of this Court to file certified copies of

brief and reply brief filed by the Georgia Power Company in the Supreme Court of the State of Georgia.

* * * *

Our original brief (pages 5 and 6) answers the mere assertion of respondent that no Federal question is involved.

Respectfully submitted,

WALTER T. COLQUITT,

Attorney for Georgia Power Company.

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Supreme Court of the United States

OCTOBER TERM 1929

No. 363

GEORGIA POWER COMPANY, *Petitioner*

VS.

CITY OF DECATUR, *Respondent*

Petition for Certiorari

Brief in Opposition to Writ

Hooper Alexander

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1929

No. 363

GEORGIA POWER COMPANY PETITIONER
VS.
CITY OF DECATUR
PETITION FOR CERTIORARI

STATEMENT OF THE ISSUES

Respondent is of opinion that this record and petition presents no federal question of any kind, unless, possibly, that the whole matter is res judicata.

Something like twenty-five years ago the Georgia Railway & Electric Company had built or acquired three lines of electric railway between Atlanta and Decatur, two of which ran north of the Georgia Railroad.

Of these two, one had been built some years earlier by The Atlanta Railway Company, and the other, the line now in controversy, had been recently built by the company named, or a predecessor out of which it had evolved.

For reasons satisfactory to itself, the Georgia Railway & Electric Company decided to dismantle the older of the two roads referred to and started work to that end. The City of Decatur began litigation to prevent this, and, pending this controversy, there was an agreement between the City and the Electric Company by the terms of which the tearing up of

the old road was permitted, the Company agreeing to carry passengers thereafter upon terms named in the contract.

The contract was fully authorized on both sides by ordinance of the City and resolution of the Directors, and appears to have been drawn with much care and deliberation on both sides. Since that time it has been before this and other courts in various forms and its validity and binding force have been fully sustained, as well as the competency of the city government to make such a contract.

About 1912 the Electric Company leased all its properties to the Georgia Railway & Power Company for a long term of years, and the latter company was in possession and operating these properties when the present litigation was begun.

From the charters of both companies and the lease contract, it appears that the line now in controversy was part of an entire system which the Electric Company was by charter authorized to operate, which the Power Company was by charter authorized to operate, and which was leased by the Electric Company to the Power Company on the covenant of the latter to operate.

After the validity of this contract had been several times upheld by this and other courts, the two companies, in 1925, determined to tear up and abandon so much of this road as lies in what is known as the five

cent zone in Decatur, but to keep the balance of the road and continue to operate it. To this end the Companies gave notice accordingly to the City, and offered to the City to surrender its permits and franchises.

Ther. upon the present action was brought to enjoin the abandonment of the property and the discontinuance of the service. An injunction was granted as prayed and the case went to the Supreme Court of Georgia on writ of error.

As preliminary to any argument and as part of the statement necessary to inform the court, it is needful to refer to and remove a legal error on the part of the petitioner.

The whole of its argument and brief is impregnated with the notion that Decatur and other towns and DeKalb County have at some time or other granted to it or its predecessors certain so-called "franchises". This is a confused notion in the minds of its counsel reflecting a failure to understand a constitutional limitation in Georgia. None of these municipalities ever had or could have granted any "franchise" at all, either to be or to do.

Both these franchises are granted by the state. But since the state of Georgia is sovereign owner of all the highways, and can do as it pleases with them, and yet the cities build and maintain their streets and the counties build and maintain their highways, it was long ago thought wise and just by the ultimate sovereign to protect these subdivisions of the state

government against the danger of whimsical grants by the legislature, (which is merely another sub agent,) and, for this reason the Constitution of 1877 was made to contain this provision:

> "The General Assembly shall not authorize the construction of any street passenger-railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

Code 6448

Later on in 1892 the Legislature itself made a similar renunciation in favor of the counties.

Under these provisions there were, no doubt, many permits granted or consents given, and these the petitioners constantly refer to as franchises, an inaccuracy which tends to confuse. Indeed the consents themselves sometime style themselves "franchises."

To the City of Decatur it seems so clear that the the issues tendered by petitioner's brief are patently not federal, that no argument is at this time made. With this brief, however, there are filed certain copies of the city's brief in the Supreme Court of Georgia, which will be found convenient if the Justices should care to inquire of the merits of the issues tendered.

The legal history of the matter is as follows:

In the year 1907 hte powers of the Railroad Commission, now known as the Public Service Commis-

sion, were extended to include supervision of trolley companies, but excepting the case of any city having a contract. The language used in the saving was as follows:

> "Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company."

(See Georgia Code 2662.)

In 1918 the Company sought by mandamus to compel the Railroad Commission to disregard the contract and fix rates notwithstanding the Act of 1907 and the Supreme Court sustained the act in 149 Georgia, page 1.

Afterwards in 1920 the Company sought to raise the rate of fare to seven cents and this was enjoined, the decision being affirmed in Georgia Railway & Power Co. vs. Town of Decatur, 152 Ga., 143, which decision was in turn affirmed by this Court in 262 U. S., 432, this Court, on page 438 directing attention to the fact that, since the rate was matter of contract, no federal question of confiscation existed.

Afterwards the same case was up again in the Supreme Court of Georgia and it was reaffirmed and language used of a somewhat vigorous character as to the finality of the decisions.

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Ga. Rwy. & P. Co., 329 Ga., 329, (331, 334.)

The present case arose in 1925 upon the occasion of an offer by the Company to surrender its rights and an announcement of its purpose to tear up and discontinue its line in the city. The final decision is not yet reported but is set out in the Transcript.

In view of this history and upon an inspection of the petition and its complaints we submit that there is no federal question made. For this reason we ask that the wirt be denied.

Respectfully Submitted

.....

For Respondent, the City of Decatur.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 363

GEORGIA POWER COMPANY, *Petitioner*

vs

CITY OF DECATUR

Writ of Certiorari to Supreme Court of Georgia

BRIEF FOR RESPONDENT

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Woodward, Hollinshed vs,
128 Ga., 7 62

Worley, Wheeler vs,
110 Ga., 513 78

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1929
No. 363

GEORGIA POWER COMPANY, *Petitioner*

vs.

CITY OF DECATUR

Writ of Certiorari to Supreme Court of Georgia

STATEMENT OF THE CASE

We think it will facilitate an understanding of the issues, if, in addition to the usual narrative of facts, we call attention in this statement to such legislative acts and judicial decisions as constitute part of the history of the controversy or serve to furnish reasons for things done. While this may make the initial statement a little longer than usual, it will save the Court some labor, and reduce the need for argument.

The Collins Park & Belt Railroad Company which, for convenience, will be referred to herein as the Collins Park Co., was, as stated by the petitioner for certiorari, chartered in 1889 by special act of the Georgia Legislature printed in the transcript on page 1. At that time the Constitution of Georgia contained the following provision, (*Code of 1882* Sec. 5077).

> "The General Assembly shall have no power to grant corporate powers and privileges to private companies except banking, insurance, railroad, navigation, canal, express, and telephone companies," * * * * *

It is also true that in 1889 the Code of Georgia contained a provision, which is still of force and to be found in Section 2215 of the present Code, as follows:

> "Should any charter granted in future by the General Assembly, to a private corporation be silent as to its continuance, such charter shall expire at the end of thirty years from the date of its grant."

If, therefore, the charter of the company was never extended, (a point on which the record in this case is entirely silent), it must be conceded to be true, as claimed by the petitioner for certiorari, that the Collins Park Company automatically ceased to exist as a corporation August 16, 1919.

In 1891 the Constitution of Georgia was amended by striking out the exceptions stated in the clause quoted and requiring all such corporate powers to be conferred under general laws, and through the office of the Secretary of State. It so appears in the subsequent Code of 1895, Sec. 5780, and in the current Code of 1910, Sec. 6446.

Appropriate legislation for carrying this amendment into effect was enacted in 1892, as will appear from the Georgia Acts of 1892, page 37, reproduced in the Code of 1920, Sec. 2577, *et sq*. There have been several amendments to this act, one of which extended all its provisions to street railroads, (*Georgia Laws* 1894, p. 69; *Code of 1910*, Sec. 2600).

Among the provisions of the act of 1892 pertinent to this case, it may be noted that by Section 8 of the act, (*Code Sec.* 2584), corporations thus created are

limited in duration to one hundred and one years, unless renewed at the expiration of that time.

It will also be noted that by Section 17 of the Law of 1892, (*Code Sec.* 2596), any railroad previously incorporated under special act, (such as the Collins Park Co.) may at any time, under the terms and machinery of the Act of 1892, amend its charter either by adopting the provisions of the act, or by extending the time for the expiration of its charter for a period of fifty years.

> Note—As the record does not inform us whether the Collins Park Co ever did or did not avail itself of this privilege to extend its life, and since there was no pleading or issue at the trial that would have made it needful, or even proper, for the City to have offered evidence on that subject, we submit to this Court whether, where a party is here asking a judgment predicated on the theory not advanced in the trial court, that the charter expired in 1919, it is not a necessary assumption that the company did so amend its charter and is still legally in existence. What premise shall be assumed on that subject we leave for the court to adopt *ex mero motu*.

By Section 18 of the law of 1892 above referred to, (*Code of Georgia of 1910*, Sec. 2597), authority for the sale or purchase of the property of a corporation of either class by one of the other was conferred as follows:

> "Any railroad company incorporated under the provisions of this Article shall have authority to sell, lease, assign, or transfer its stock, property, and franchises to, or to consolidate the same with, those of any other railroad company incorporated under the laws of this or any other State or of the United States, whose railroad within or without

this State shall connect with or form a continuous line with the railroad of the company incorporated under this law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this Article may purchase, lease, consolidate with, absorb, and merge into itself the stock, property, and franchises of any other railroad company incorporated under the laws of this or any other State of the United States, whose railroad within or without this State shall connect with or form a continuous line or system with the railroad of such company incorporated under this law, upon such terms as may be agreed upon. And it shall be lawful for any railroad company or corporation now or hereafter formed by the consolidation of one or more railroad companies, or corporations, organized under the laws of this State; or under the laws of this State and any other States, with one or more companies or corporations organized under the laws of any other State, or under the laws of this and other states, to issue its bonds and stock as provided for in this Article, in such amounts as they may deem necessary for the purpose of paying or exchanging the same for or retiring any bonds or stocks theretofore issued by either of the said companies, or corporations, so merged, purchased, or consolidated, or for any other purpose, and to the amount authorized by the laws of the State under which either of said companies, or corporations, so consolidated, was organized, and to secure the same, in case of bonds, by mortgages or trust deeds upon its real or personal property, franchises, rights, and privileges, whether within or without this State.

Pursuant to the authority of the Act of 1892, and expressly referring thereto, divers persons applied in January 1902 to be incorporated as the Georgia Rail-

way & Electric Company, for the full period of one hundred and one years, with power "to purchase and own existing lines or to construct their own lines" in certain designated streets and towns, for "a railroad" that was in terms to be "about 140 miles as near as can be estimated," including as part thereof, by description, the identical line now considered, (*transcript pp. 8 to 11*,) the application containing the following recital: (*p. 9.*)

> "The purpose being to purchase and acquire, or build and construct, and maintain and operate, a complete system of street and suburban railroads for the purpose of transporting persons and property in the cities and town of Atlanta, Decatur," etc.

The certificate of incorporation, issued January 28, 1902, referred to the petition as being "for the purchasing, owning, constructing, equipping, maintaining and operating *a street and surburban railroad*," etc., (italics ours,) (*transcript p. 12*,) and declared the petition granted and the company incorporated for the purposes stated, and for one hundred and one years. (*p. 12.*)

In 1900 the Collins Park Co. had obtained an amendment to its charter, under the terms of the act of 1892, changing its name to Atlanta Rapid Transit Company, (*p. 6*), and, in March 1902, under that name, conveyed to the new company, (Ga. Rwy. & E. Co.,) "all of its property, together with its different lines of railway," (*transcript pp. 13 and 51*). Which included the line in question, and which line thereby became part of the "*system*," or "*railroad*," which the purchaser had by the terms of its charter been incor-

porated to create through the purchase of old separate lines and the construction of new ones.

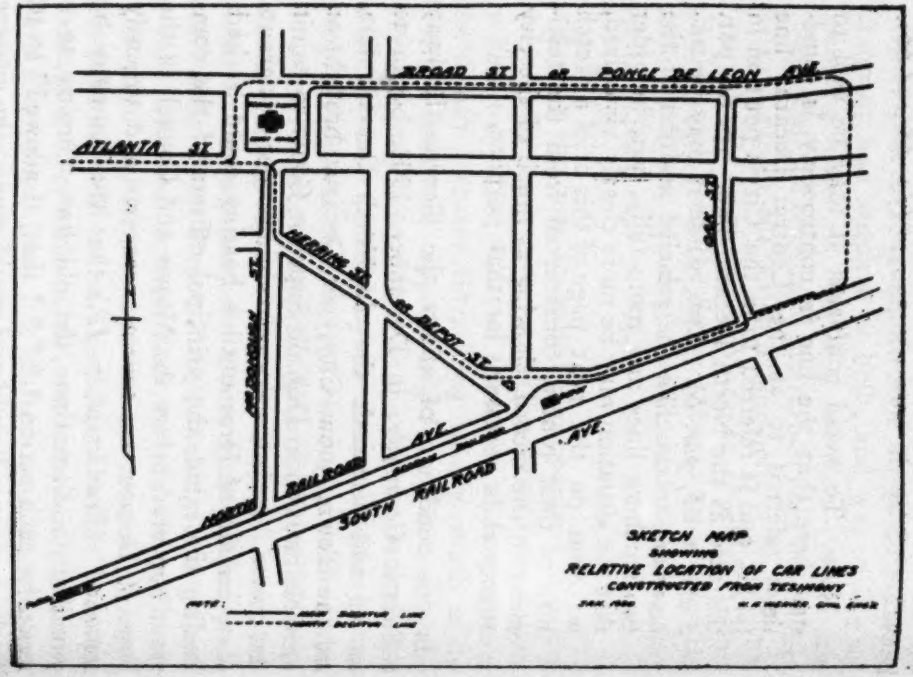
After March 1902 the Georgia Railway & Electric Company had acquired or built, and was owning and operating under its charter a complete system, composed of all the street and interurban lines in or around Atlanta except the Atlanta Northern, a line running from Atlanta northwest to Marietta, of which it owned all the stock, and the Stone Mountain line from Decatur to Stone Mountain which had not then been built. (*Transcript p. 51*).

Among the lines so owned and operated as part of the system were three interurban lines from Atlanta to Decatur. The oldest of these was and is known as the South Decatur line, lying wholly south of the Georgia Railroad. (*pp. 49 and 54*). The next oldest was generally referred to as the North Decatur line, originally built in 1892 by the Atlanta Railway Company. This was the line that was afterwards discontinued. It entered Decatur from the west but some distance north of the Georgia Railroad, ran along Atlanta Avenue, past the Court House Square, and eastwardly down Depot Street, making a loop about a mile long and coming back by the Court Square. The third and newest was the line now in question, generally referred to as The Main Decatur line, constructed a short while before, ostensibly by the Collins Park Company. This line started near the center of Atlanta, ran through the territory formerly included in the towns of Edgewood and Kirkwood, both of which have since been abolished and incorporated in Atlanta, and through certain rural territory of DeKalb County now included in Decatur, entering Decatur from the West along Railroad Avenue, in-

mediately north of the Georgia Railroad, making a loop of about a mile and coming back by the Court House Square (*Transcript pp. 49, 51, 53, 54, 65, and 83,*) By December, 1902 all three of these lines had been acquired by the new company. (*pp. 65 and 66*).

Note. To avoid confusion it may be well to state here that the line in controversy is sometimes referred to as the Central Decatur line (p. 51), and is referred to in the City's petition in this case as the North Decatur line. (p. 64, par. *5 and p. 65, par. 6*). Also, while it may be unnecessary to describe the relative position of the two northern lines any more fully, yet, in order that the situation may be more clearly visualized, we print on the next page of this brief a sketch map of their routes, constructed from the testimony in the record, showing as much of the city streets as is necessary for that purpose.

In this condition of affairs the Georgia Railway & Electric Company, in December, 1902, began to tear up and dismantle the old North Decatur line, and the Town, (now City,) of Decatur brought an equitable petition in DeKalb Superior Court to enjoin that course. A temporary restraining order was granted, to remain of force until a hearing could be had. Pending the same, the principal officers of the company "appeared before the Mayor and Council of the Town of Decatur on several occasions and urgently requested" (*Transcript, p. 13,*) that the company be permitted to discontinue the old line, "urging as a reason for such action * * * * * that, if allowed" so to do, the company, "could and would give to the citizens of the Town of Decatur better street car facilities upon another parallel line" etc. (*Ib*).


BROAD ST
PONCE DE LEON AVE
ATLANTA ST
GERRARD ST
OAK ST
AVE
AVE.
SOUTH RAILROAD
SKETCH MAP
SHOWING
RELATIVE LOCATION OF CAR LINES
CONSTRUCTED FROM TESHAWAY

With grave doubt and hesitation, and some distrust manifest from the documents, the town government finally yielded to these importunities, and an agreement of accord and satisfaction was reached, under which the old line was discontinued and torn up to a point half way between Atlanta and Decatur, about three and a half miles to the west. The documents constituting the contract are fully set out in the transcript, beginning on page 13, and show the utmost care and deliberation on both sides, the City insisting on the most meticulous evidence of consent and an affirmative covenant on the part of the company to do and perform. How far the city may have been warranted in its apprehensions and suspicions is not a question here necessary to be discussed, but, as the whole complexion of the company's case indicates a desire to put the city in the light of oppressor, we invoke a careful consideration of the documents. Both sides thereafter acted under and observed the terms of the agreement without question until Oct. 5, 1920, a date which should be borne in mind as having an important bearing on some of the legal questions involved in the present litigation.

In October, 1911, divers persons applied to the Secretary of State under the provisions of the Act of 1892 to be incorporated for 101 years as a "suburban, interurban and street railroad company" to be known as The Georgia Railway & Power Co. (*Transcript p. 20.*) The application set up *inter alia* that "the length of the said road" would be about two hundred miles. The lines described as composing this two hundred miles included the Main Decatur line and the South Decatur line and the application indicated a purpose, as such proposed corporation to "construct and build,

or purchase lease and acquire" such lines, asked specific power so to do, and contained the recital, (*page 23*),

> "The purpose being to purchase, lease, acquire, build, construct, own, hold, maintain and operate *a complete system*, (italics ours), of street suburban and interburban railroads," etc.

and further indicated a purpose to

> "connect the said various towns and cities and various points in said cities and towns with each other, and with such other points within or without the said cities and towns" etc.

Certificate of incorporation was made as prayed, and the Georgia Railway & Power Co. came into existence for one hundred and one years, the internal evidence indicating unmistakable practical identity of the two corporations, though separate nominal corporate existence.

On January 1, 1912 the Georgia Railway & Electric Company leased all its properties to the Georgia Railway & Power Co. for 999 years. Parts of the lease contract appear in the record, enough to indicate as follows:

That the lessor owned and was operating "an electric railroad" in and about Atlanta (*p. 28*) upon which it had placed a twenty million dollar mortgage, besides all the capital stock of certain other utility corporations including The Atlanta Northern Railway; that the lessee had been organized as a corporation under the laws of Georgia for the purpose of such owning and operation and with power to take over the property (*p. 29*). Whereupon it demised and leased, etc.

The lessor covenanted to maintain its corporate existence, renew the same from time to time, and deliver possession, etc. and the lessee to pay divers charges, including interest on the bonds, sinking fund, taxes, etc, accept the property in its then condition, and that, "subject to the provisions of existing and future municipal grants," it will maintain, etc. (*p. 33*). It also assumes all the contracts and other obligations of the lessor, (*p. 35*,) and agrees that it will operate the properties in accordance with the laws of Georgia, (*p. 35*). In Section 26, (*p. 36*,) it covenants to perform all the obligations of the lessor imposed by any law or municipal contract.

In 1907 the General Assembly had enlarged the powers of the Railroad Commission, (now called the Public Service Commission,) by extending their rate fixing authority to street cars, but adding this proviso, which is still or force, and to be found in Section 2662 of the Code:

> "Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company; and provided that this section shall not operate as a repeal of any existing municipal ordinance."

In view of certain strained deductions petitioner seeks to draw from this proviso, it may be here properly mentioned that it limited the authority of the Board only as expressed; i. e., by forbidding it to impair any contract. In other respects companies having such contracts were subject to the authority of the board just exactly like others. In the case of this company the authority of the Board can not alter fares or permit it to abandon its line. As to all other matters it is

subject to the control of the board in the same way as other parts of the "system."

In 1918 the lessee company applied to the Railroad Commission for an increase in rates on the lines operated by it, the increase affecting four municipalities, each of which claimed contractual obligations on the subject, one of these being Decatur. The Commission held that under the law above quoted it had no jurisdiction. The lessee thereupon applied for a mandamus which was denied. The case went to the Supreme Court and is reported in 149 Georgia, page 1. The Supreme Court held, in so far as Decatur was concerned, that the contract of April 1, 1903 is a "valid subsisting contract," (*p. 11 of the report,*) and in 1919 affirmed the judgment to that extent.

In several parts of the brief filed by petitioner for certiorari, reference is made to an alleged order of the Georgia Public Service Commission as holding that the rate agreed on is confiscatory. We have never considered this relevant, or deemed it necessary to enter into any discussion of this action of the Commission, for the reason that it was wholly without jurisdiction on the subject, and its order in question not only purely *ex parte*, without any notice to or hearing from the Town of Decatur, but also because what it said was a void utterance amounting to no more than street gossip. In addition to these infirmities, however, the additional fact remains, to which we should perhaps, at this point, direct the court's attention, that the order in question did not find or declare, as so often inaccurately stated in the brief and pleadings of the petitioner, that the rate was confiscatory. What it did say was that the rate as fixed by the contract was not fairly compensatory. Even

this statement we would deny by evidence in any case where it was a relevant issue. It did not even disclose what data or what considerations the commission fancied should enter into any conclusion as to what is necessary to make a rate or the return therefrom "fairly compensatory."

On October 5, 1920, a date referred to on page 9 *supra* as important, the Georgia Railway & Power Company, (the lessee,) notified the mayor and council of Decatur that on and after the 20th of that month it would charge a fare of seven cents on the main Decatur line, and that it denied the legality and validity of the contract of 1903, alleging also that if the contract was ever valid it had ceased to be so, but not explaining why. (*See Transcript, page 71.*) The Town sought an injunction in DeKalb Superior Court in case No. 2497 (*ib*) setting up therein the facts already herein detailed.

An interlocutory restraining order having been granted, the case went to the Supreme Court of Georgia where the ruling was affirmed, as will appear by reference to *Georgia Rwy. & Power Co. vs. Decatur*, 152 Ga., 143.

Afterwards, the case having come on for a final hearing, and the injunction being made permanent, it went again to the Supreme Court of Georgia where it was again affirmed in 153 Ga., 329, the court declaring (p. 331,) that every possible question had been settled in the mandamus case and in the case arising on the temporary injunction.

The matter was then brought to this court on writ of error and the judgment affirmed, (at least so far as

concerns the questions now at issue,) in June, 1923, in the case of *Georgia Ryw. & Power Co. vs. Decatur*, 262 U. S., 432.

In 1925 the City of Decatur, successor to the Town of Decatur, adopted an ordinance for the paving of certain streets which would entail some expense on the company, and against which, in July of that year it protested in certain correspondence shown on pages 39 to 41 of the transcript. This correspondence is without legal significance, and seems to have been intended to make a case for anticipated litigation by including somewhat exaggerated and inaccurate statements as to the expense. No evidence was offered in support of these assertions except the fact that afterwards, the City was undertaking to collect some $14,000.00 for the Company's proportion of the cost. (*Transcript p. 52*).

In September the lessor and lessee companies offered to the City government to surrender the "permits and franchises" granted by the City for construction and operation of the Main Decatur line. The documents constituting the proposal to surrender appear on pages 42 to 47 of the Transcript, but are too long to set out here. For the present we direct attention to the fact, which may or may not be relevant and important, that the offer not only did not contemplate an abandonment of any part of the line west of Decatur, but manifestly did not contemplete surrender of any part of it even inside the City, except that part lying east of the old town limit at Patillo Station and in the five cent zone. The words "from the western town limits" occurring in the document, (*page 43,*) evidently refer to the town limits as they existed in

1899. The significance of this fact will be appreciated and understood if reference is had to that part of the opinion of this court in the case of *The Georgia Railway & Power Co. vs. Town of Decatur*, 262 U. S., page 432, which occurs on pages 439 and 440 of the opinion, and concerns certain rural territory annexed to the town west of Pattillo Station after the contract was made.

Simultaneously with this offer the president of the lessee company advised the city that on September 20th (30th?) it would discontinue the operation of tne line in Decatur. (*page 42*).

Thereupon, on Sept. 28, the City declined to accept the surrender, (*p. 48*,) and on the 29th, filed its equitable petition to enjoin the threatened course. This petition is set out in the transcript, page 63 *et sq*. It sets up the facts substantially as hereinbefore narrated and makes certain particular issues and allegations that may be here specially mentioned, as follows:

It alleges that one of the lines of the defendant's system is the North Decatur line, meaning thereby the line in question herein referred to as the Main Decatur line, (*see also par. 13, p. 69*,) running from an indicated point in Atlanta and into the City of Decatur, a total distance of six and a half miles, including the loop; (*par. 5, page 64*,) that the length of the line in Decatur is about two miles, on one half of which a five cent fare is collected; (*par. 6, page 65*,) that the Town of Decatur had fully and at all times performed its part of the contract of April 1, 1903, to the detriment and inconvenience of the citizens; (*par. 16, p. 69*;) that the lessor and lessee companies had for many years enjoyed the benefit thereof; (*ib*) that for twenty-two years the two companies had

operated in accordance with its terms; (*par. 17, p. 70;*) that the lessor company had built the double track as provided in the contract and as permitted thereby; (*ib*) that since its construction the two companies have operated the line as part of a single system and never as a separate or single line; (*paragraph 20 and 21, pp. 71 and 72,*) and that when the charter of the Town of Decatur was amended in 1922 and the Town denominated a city, it was expressly provided by the General Assembly that the valid and susbisting contracts of the town with any corporation should inure to the benefit of the City and that the City should assume the obligations thereof. (*par. 22, p. 72*).

The petition further alleged that there is no law authorising the defendants to surrender their franchises, and no order of any function of government authorising them to cease the operation of cars on said line or any part thereof. (*par. 26, p. 73.*) It also specially pleaded and set up that the right of the defendants so to surrender or cease operation under the contract of April 1, 1903, was determined and adjudicated in the cases already herein referred to in the Supreme Court of Georgia and in this court, and that the issues involved are *res adjudicata*, not only by reason of these matters but by the final decree of DeKalb Superior Court itself in said case No. 2497.

The defendant's answer involved a somewhat sweeping denial of nearly all the material allegations of the petition. In view of the present state of the record it is not important to comment on these denials, since the agreed statement practically nullifies the denials. We think the evidence sustains the allegations of the petition.

Examination of the answer will show that we are warranted in saying that it contained no hint or suggestion of any claim to the effect that the contract of April 1, 1903, was either expressly or by implication limited in its duration to the lifetime of the Collins Park Corporation. Neither did it suggest any claim that the contract was in any other way limited in time.

Aside from its sweeping and general denials of the allegations in the petition only two special matters of defense were set up, as follows

1. One of these, contained principally in paragraphs 10 to 16 of the answer, (*p. 80-83*), was apparently an attempt to show that the line in question was not part of a system but separate property.

2. The other was a defense set up, (*par. 17-19, p. 85-88*), to the effect that the Legislature of 1919 had empowered Decatur to do certain street paving and assess part of the expense thereof against property owners benefitted thereby; that the City had done such paving and was charging a large amount to the Company. Alleging that the act in question was unconstitutional and void, it prayed an injunction against the enforcement of the charge. (*p. 88*) By an amendment filed in April, 1926, the allegations touching the injustice and invalidity of the paving charge were elaborated, but no amendment was made to the prayer that the act be held unconstitutional and its enforcement enjoined. (*pp. 89-95*).

In July, 1928, the fact was suggested of record by attorneys for the Company that, pending the litigation, the lessor and lessee corporations had been merged and consolidated as the Georgia Power Company and motion was granted to substitute this concern

as defendant. (*p. 96*).

In 1928 the case came on for a hearing in DeKalb Superior Court, the presiding judge sitting by agreement as judge and jury to pass on all questions of law and fact. (*p. 1*).

The decree made no separate finding of fact, but enjoined the company as prayed. (*p. 61.*) The decree was also silent as to the paving matter. It was dated Sept. 15, 1928.

Within due time the Company sued out its writ of error to carry the matter before the Supreme Court of Georgia, the assignments of error (*Transcript pp. 61 and 62,*) being as follows:

> "That the said decree was erroneous and contrary to law and contrary to the evidence in said case and without evidence to support it, and that said Judge erred in not denying the relief prayed for by the plaintiff in said case, and erred in granting the injunction prayed for therein and enjoining the defendant as prayed and set out in said petition.
>
> "That said court in not granting it the relief prayed for in its answer and cross-bill and its answer and cross bill as amended erred and excepts to the refusal of said court to grant each and every one of the prayers and the relief asked for by said defendant * * * * * in its answer and cross bill as amended and assigns error thereon and says that the court erred in refusing to grant it each and every one of the grounds of relief prayed for and set out in its said answer and cross bill."

ARGUMENT AND BRIEF

FIRST PART—THE CITY'S CASE

I. *A Simple Matter of Private Contract Involving no Federal Question.*

II. *Questions Relating to the Paving Matter.*

THE AFFIRMATIVE CASE FOR THE CITY

I. A Simple Matter of Private Contract. Involving No Federal Question

The case for the City is unusually simple. By express contract in writing which both parties had authority to make, the Company covenanted upon adequate consideration, that it would double track the line in question "from terminus to terminus," maintain and operate the same in safe and comfortable condition, "grant one transfer ticket upon the payment of one full fare, * * * from any point within the Town of Decatur on said line, * * * * to any point within the City of Atlanta on any of its lines in said city, and vice versa, * * * * and that it would never charge more than five cents for one fare * * * * * for one passenger * * * * * from the terminus of said line in the City of Atlanta to the terminus of the same in the town of Decatur," * * * * * and vice versa.

In previous litigation it has been definitely and finally ruled that this contract was within the corporate power of the City of make; (*Ga. Rwy. and Power Co. vs. Railroad Commission of Georgia*,) 149 Ga., 1, pp. 5, 6, and 7.); that it was a "valid and subsisting" contract in 1907, and was still subsisting in 1919, (*ib* p. 11.); that it was still a valid and subsisting contract after the 5th day of October, 1920, (*Ga. Rwy. & Power Co. vs. Town of Decatur, 152 Ga., 143,*); that the last named case was *res judicata* of the entire subject and had settled every question between the parties, (*Ga. Rwy. & Power Co. vs. Town of Decatur*, 153 Ga., 329,); and that, since the rate and service in controversy was matter of contract, the prohibitions of the 14th Amendment are not involved. (*Ga. Rwy. & Power Co. vs. Decatur*, 262 U. S., 432).

In the report of the case as shown in the Transcript, page 97, *et sq.* (see also 168 Ga., 705), the two paragraphs marked 1 and 2 are really the decision. These "head notes" are written by the court in Georgia and not by the reporter, this being the requirement of Code Section 6202 where they are referred to as "a synopsis of the points decided." By Code Section 6130 it is provided that the judges may direct the reporter to omit entirely a full report where the points decided may be clearly understood from the head notes or synopsis, and many cases are so published by head notes only.

Of course we are not here questioning the importance of the opinion; we rely on it; but, in order that this court may know exactly what was decided, we are explaining the principles stated.

In addition to what is so ruled in the head notes, the opinion observes, in substance, that the terms of the contract show it to have been intended as a permanent operating contract; that to permit the company to tear up its track would destroy the contract; that towns have nothing in the nature of a franchise to give, except their consent to what the state has given; that if the contract did not expressly give that consent to this company or its predecessor it did so by necessary implication; that the court is not concerned with the question of any franchise or consent, but with a "specific" contract; and that the line in controversy is part of a great street railway system which the company can not, under the authorities, abandon.

Except for the allegations made in the original answer, in paragraph 17 to 19 inclusive, (*Transcript pp.*

85 to 88,) and in the amended answer, paragraphs 20 to 25 inclusive, (*pp. 89 to 95*,) which matters relate to a certain paving assessment, and are presented expressly as a "cross bill," the defenses presented consist only in a general denial and a claim that, for reasons given, the line is not part of a system so as to be within the rule laid down in *Fort Smith Light & Traction Co. vs. Bourland, et al.*, reported in 267 U. S., 330, and other such cases.

> Note—Attention is here called to the fact that, in what is said by the Georgia Court on page 100 of the printed transcript, in reference to a defense contained in paragraph 37 of the answer the court is not speaking of the answer in this case, but of the answer in a former case, between the same parties in 1920. If this court desires to examine that record, as the Georgia Court did, it will be found at page 228 of the printed transcript in No. 463, October Term, 1922, (29,013.)

The matter of the paving assessment is not presented as a direct defense to the City's suit, or as constituting any reason why the city's petition is, in itself, unwarranted, but as the basis for praying independent relief by way of injunction against the assessment, on the suggestion that it depends on an unconstitutional law. We will reply later to this matter. For the present we submit that, outside of the cross bill on the pavement matter, the defense raises no federal question whatever.

We have candidly sought to find such a question, and we can find nothing in the case that differs from any other case in which one party to a private contract threatens to abandon, and the court enjoins him from so doing.

Counsel for petitioner are at pains to demonstrate that, where a federal right is at stake and a contract is set up, either to aid or defeat the assertion of such a right, this court is not bound by the interpretation of the state courts either as to the existence, the meaning, or the duration of the contract, but will determine these matters for itself. Counsel might have spared themselves that labor. The writer of this brief would distrust the soundness of his own reasoning faculties if he even needed authority to tell him that, where a federal right or duty is involved, this court not only may, but must, determine that question for itself. Any other view would involve an abdication of its duty by this court.

But what federal right is involved? Not any impairment of a contractual obligation, for the constitutional provision on that subject relates only to impairment by legislative action. Moreover the City is not assailing but defending the contractual obligation, and nobody, not even the defendant company itself, denies it.

Certainly it is not the deprivation of property without due process, for that inhibition relates only to deprivation by official action, and no branch of the state government has touched the subject except the courts, and the courts have acted only after notice and hearing. These things *are* due process.

It may be that we are mistaken, but it is not our understanding that either the 5th or the 14th Amendment guarantees against judicial error. They only insure against arbitrary action that denies a legal hearing, and guarantee an honest judicial effort to decide a controversy. If the prohibitions referred to go further

than that, it results that any alleged error in construing any private contract or deciding any other private dispute, opens tne door of this court to an appeal by the losing party.

Possibly, if a state court should whimsically depart in a given case from some long established line of decision that had become a rule or property, or should corruptly so construe a contract as to destroy vested rights, some question of due process might arise; and certainly a decision by a state court would be open to review here for mere error, where the question before the court was as to whether some previous legislative or administrative action violated due process. But we can see nothing to warrant a federal inquiry as to whether a state court decided right or wrong in passing on the meaning or effect of a private contract or the fact of a private tort. If the Power Company was deprived of any property or property right, it was not done without "due process of law."

But suppose it *is* within the province of this court to review the conclusions of the Georgia Court; has not that been done already? In respect of this very contract this Court said in the case cited from 262 U. S.,

> "The contract being valid, we are not concerned with the question of whether the rates are confiscatory."

Counsel for the company are evidently confused in their appraisement of the value of certain cases in which there were either no contracts at all, or merely obligations or immunities arising by operation of law. In addition to the previous ruling of this court in this

case, above quoted, there are any number of cases in which it has been held in express language, or by necessary implication, that public utility concerns are bound by their covenants just exactly as any other person is bound. We suppose there is no case anywhere to the contrary. It would be a work of supererogation to pile up a great multitude of authority. The principle is elementary.

Thus the case of *Franklin Telegraph Co. vs. Harrison*, 145 U. S., 459, was not only an effort by a public utility concern to avoid its contract, but was one, in many respects singularly like the case at bar, and the reasoning of this court was so curiously applicable here, that by the change of a score or so or words, the opinion would fit this case. We quote as follows:

> "Why shall not the telegraph company perform the terms of its contract? Its original execution was unattended by fraud, surprise, misrepresentation, imposition, concealment of material facts, or mistake. The parties thoroughly understood the situation and knew what they were doing. The possibility that, by reason of an increase in the population and business of New York and Philadelphia, the use of a telegraphic wire between those cities could, in time, be sold for more than $600 per annum was, of course, present to the minds of those who were interested in the telegraph company, and to whom were entrusted the negotiations for the relinquishment of the contract Harrison Bros. & Co. had with the Insulated Lines Telegraph Company. Nevertheless, the telegraph company deliberately chose to risk that possibility in order to get the Harrison contract out of its way. That contract having been relinquished, and a large sum, exceeding $10,000, having been advanced by Harrison Bros. & Co. to erect the wire, the telegraph company

ought not to be heard to urge, as a ground for not performing its agreement, that the annual license fee stipulated to be paid by appellees is much less than could be now obtained from others. If competing telegraph lines had been established between New York and Philadelphia, and by reason thereof such use as appellees and their licensees make of the wire in question could now be had for much less than $600 per annum, that cirstance would hardly constitute sufficient ground for them to refuse payment of the full amount stipulated to be paid for its use annually. A different rule should not be applied where the price has increased, because of the absence of competition among telegraph companies, or from other causes not attributable to the plaintiffs."

So in *Detroit vs. Detroit Citizens St. Rwy. Co.*, 184 U. S., 368, there was a contract presenting even more striking points of similarity to the case at bar. True the situation was reversed there, and it was the city that was seeking to depart from the contract. It hardly needs argument to show that, if the contract was binding on the city, it was equally binding on the company. If authority is needed on that subject, it was said in the opinion in that case, (page 387,) that

"the language used amounted to an agreement upon the subject matter which could not be altered during its continuance by either party."

Another case presenting many points of similarity to this, was *Columbus Railway P. & L. Co. vs. Columbus et al*, 249 U. S., 399. In that case it was said on page 409,

"By these contracts, obligatory alike upon the city and the company, the city granted the right to use the streets and the company bound itself

to furnish the contemplated service at the rates of fare fixed in the ordinances. We cannot agree with the contention of the appellant that these were permissive franchises, granted and accepted with the right upon the part of the company to abandon the uses and purposes for which the franchises were granted because the rates fixed became unremunerative, as alleged in the amended bill. The authority under which the city acted came from the state, and was granted by proper statutes passed for that purpose. The contracts were made between the city and the company, and became mutually binding for the period named in the ordinances."

In Southern Iowa Electric Co. vs. Chariton, 255 U. S., 542, the decision was against the city, but upon the express ground that, under the declared policies of Iowa, cities had no power to make such contracts. On the abstract principle involved, this court said,

"Where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

While these cited cases rule exactly the principle we are contending for, as matter of substantive law, it should not be assumed that they imply the existence of any federal question in the matter. All four of these cases came up from federal trial courts. In the *Chariton* case there was a resultant federal question. It was conceded that if the contract was void, the effort to reduce rates would violate the 14th amendment;

but, if the contract was valid, there was no such question. Whether the contract was good or not, was to be and was determined by examining what the Iowa Court held on that subject. If this court had held to a different view as to the meaning or validity of the contract, it would conceivably have raised a most delicate and difficult question. Apparently this court accepted the opinion of the Iowa court as to the authority of the City to make such a contract.

And this, we submit, is the true rule; that, in cases where, if there was no contract, the thing complained of would violate a federal right, this court will determine for itself as to the existence, meaning and effect of the alleged contract; but will be bound by the judgment of the state court as to the legal authority of the corporation to make it.

Fortunately for us, it is not necessary to argue these questions. We have not the faintest objection to this court's construing both the authority of the city to make the contract and its significance when made. We have presented our views on these subjects in the sole purpose to discharge the full duty resting upon counsellors of the court.

II. The Question of the Paving Assessment

Respondent is in doubt whether it is necessary to discuss this question at all. Unlike some of the issues presented in petitioner's brief, it was made by the pleadings, and there was an adequate assignment of error on it in the Supreme Court of Georgia. On the other hand, there seems to be no assignment of error on it in this court, and it is ignored in the brief filed for the petitioner. It seems to be abandoned here.

But it does raise a federal question, and, it is the only thing in the record that does make such a question. It seems to have been entirely ignored in the decision, as well as in the opinion of the Supreme Court of Georgia.

In the uncertainty by which we are embarrassed in these circumstances, desiring neither to vex the court with needless argument, nor neglect an issue, we discuss the question in an appendix to the brief, so that if, for any reason, it is thought necessary to consider it, the court can do so; while, if it is deemed unneccessary, the court can ignore it as the Supreme Court of Georgia did, and as the petition for certiorari has done here.

SECOND PART—CERTAIN PRELIMINARY AND EXPLANATORY MATTER

I. The Assignments of Error

II. The City's Relation to the Franchise

CERTAIN PRELIMINARY QUESTIONS

I. The Assignments of Error

There are presented in petitioner's brief certain special contentions that were not considered or passed on by the Supreme Court of Georgia at all, such as the alleged termination of the Collins Park Charter and the consequences thereof; the matter of the duration of the contract, and the necessity and sufficiency of the offer to surrender the franchise. While we are entirely willing to discuss these questions on their merits, and would, indeed, prefer to do so, we do not think they are in the case. If there was any error committed in respect of them in the trial court, it would be unjust to the Supreme Court of Georgia to ascribe error to it, because, under the law, it had no jurisdiction to consider these matters.

Candor requires that we advise the court why we think the Georgia Court, whose decision is under review, could not have considered these matters. This makes it necessary that we explain the appellate jurisdiction and practice in Georgia; but, as this Court may not, and probably will not deem it necessary to consider the matter at all, we collect the authorities on the subject in an appendix, merely summarizing the principles here, but promising that the appendix will fully support the statements now to be made.

1. By the Constitution the Supreme Court is expressly denied any original jurisdiction and declared to be restricted to the correction of errors.

2. In this Court the assignments of error are merely

the *ex parte* declarations of the plaintiff in error as to the legal propositions he intends to advance; and, while no other errors, will generally be considered, the court reserves the right to consider a plain error even though not assigned. In Georgia there is a valid statute forbidding the court to decide any question that is not made by "a special assignment in the bill of exceptions."

3. There is a reason for this. The certificate of the trial judge is declared to be "the writ of error," and the assignments must be set out in the bill. Being so certified the statute directs that the judge shall add such note or statement as will inform the appellate court of such matters connected with the case as may be material to a clear understanding of the error complained of.

4. The "special assignment" referred to as necessary to give the court jurisdiction has been fully defined by the courts. To comply with the requirement, the ground of error must be "distinctly set forth." It must not only specify the decision complained of, but "must point out the error in such decision," and "must point out the reason why the decision is error." It must allege error so distinctly, that "a reviewing court may understand the ground of error relied on."

5. Where, as in the instant case, matters both of law and fact are passed on by the trial judge, the assignment must indicate whether the error is alleged to be in the findings of facts, or in the law applicable thereto, and this is true even though it may be "gathered" from the bill of exceptions that the error assigned relates to the law rather than the facts.

6. These rules are deemed necessary in fairness to the trial judge who would otherwise be in danger of being "ambushed;" to the adversary counsel "in order that he may know" what he is to meet; and to the reviewing court in order that it need not "wander through" the record, "in search for questions to determine or error to reverse."

7. These rules do not conflict with another rule under which one general assignment as to overruling a motion or a demurrer is sufficient to reach every ground therein set out.

In this connection it is proper to add that since the establishment of our judiciary in 1799, the fundamental principle in all pleading has been simplicity and clearness, embodied in the brief requirement, (*Code* 5538) that the plaintiff shall "plainly, fully, and distinctly" set forth his grievance, and the defendant shall "plainly, fully and distinctly", (*Code* 5635,) set forth his defense; to which it is added, (*Code* 5636,) that a general denial warrants no other defense than such as disproves the plaintiff's allegations, and that "all other matters in confession or avoidance must be specially pleaded."

The case of *Johnson vs. Ballingall*, 1 Ga., 68, interpreting these rules, remains to this day the unchallenged law, including the dictum therein that

> "All matters in confession and avoidance, whether going to the original making of the contract, or to its subsequent discharge, must now be specially pleaded."

Under these principles it must be clear that not only

was there no assignment of error in the Georgia Supreme Court, sufficient to warrant it in passing on the matters referred to, but there could have been none, because there was no such issue made in the pleadings before the trial court.

And these principles will explain what the Supreme Court of Georgia meant when it said in the decision and opinion now considered,

> "Regardless of whether the assignments of error in the bill of exceptions raise the question of the expiration of the charter of the Collins Park & Belt Railroad Company, so that it can be considered by this Court, it is clear, etc."

The principles here set out and the more elaborate treatment of the subject of the assignment of error beginning in the appendix on page 74 *infra*, will be referred to when we come to discuss the questions to which they are applicable.

If our views are correct, the questions discussed in the petitioner's brief not only were not passed on by the Supreme Court of Georgia, but could not have been. Clearly, therefore, it would be most inappropriate to say that that court erred, in not considering these matters, when it was forbidden by law to do so. It would not only destroy the law of Georgia which forbids them to decide errors not assigned, but it would have been contrary to all the principles of jurisprudence to consider issues that were not before the trial court.

II. The City's Relation to the Franchise

Another preliminary matter that it may be well at

this point to make clear, relates to the question of who grants the franchise for a street railway in Georgia. Apparently, in a number of the states the franchise is granted by a city. Possibly it may not be a matter of great importance, but it will avoid confusion to say that such is not the case in Georgia. And this is true, although it is frequently spoken of otherwise, and although, in the pleadings in this case, even counsel for the city so referred to it.

In the decision now considered the Supreme Court of Georgia said,

> "Under the constitution all that towns and cities have to give to the construction of passenger street railways within the limits of the same is the consent of the corporate authorities."

It is elementary that the highways of a state, including city streets, are the property of the state. They may be built, some by the counties and some by municipalities, as indeed they are in Georgia, and the state may grant and does grant, either to county or city, extensive authority over them, but, after all, they belong to the state, and the state may do as it pleases with them, at least so far as concerns the rights of city or county.

Judicial authority on this subject in Georgia is abundant, but it will perhaps be sufficient to cite the case of *The Savannah etc. Railroad Co. vs. Savannah*, 45 Ga., 602, where it was said,

> "The State has the same right of eminent domain over the streets and squares of Savannah, dedicated to the use of the inhabitants of the

city, by Act of 1760, and those since laid out upon the common, dedicated by that Act to the same use, as it has over other territory of the State, and may lay an additional servitude upon such streets and squares, by granting to a corporation the right to run a street railway, whose cars are drawn by animal power, through them, without the consent of the Mayor and Aldermen of the city."

And the case of *Floyd County vs. The Railroad*, 77 Ga., 619, where the court quoted and adopted this dictum from Pierce on Railroads:

"The legislature, unless restricted by the State constitution, may, even without the consent of a municipality, and without allowing it compensation, authorize railroads to be laid in its highways. If the city or town is deemed the owner of the fee, it holds the interest as trustee of the public, without the title to compensation as proprietor. The statute, however, may require the consent of the municipality."

The case above cited from the 45th Georgia, was decided in 1872. In 1877 a consitutional convention was held and the constitution by it adopted imposed numerous limitations on the legislative authority, one of which, adopted no doubt because of the rule in the 45th Georgia case, and now shown in Code Section 6448, was as follows:

"The General Assembly shall not authorize the construction of any street passenger-railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

The just provisions of this law, thus made compulsory on the legislature, was voluntarily extended

by that body in the general incorporation law of 1892, referred to on page 2 *supra*, for like protection to the counties. (See Code 2585, sub-section 5.)

Further than thus, by its consent, to make the state's corporate franchises to be and to do, effective, it will be apparent that a town or city has no power or authority in the premises at all. In giving such consent municipalities frequently use language appropriate to grants, and in legal pleadings and even in judicial utterances the same inaccuracy often occurs, but the brief and simple history of the matter above set out demonstrates that the corporate existence and privileges emanate solely from the state, and that the city has nothing to do with the matter except to consent to a user of the highway that has been already authorised by the state. It follows that, when these privileges are surrendered, they must be surrendered, not to the city, but rather to the sovereign who granted them.

And we submit here that the limitation contained in 6448 merely operated to give to municipalities the same power and protection that is otherwise secured by the Constitution to private persons, and to put the city on the same footing, *pro tanto*, as to its streets, that an individual has as to his private land. Thus if the state incorporates a trolley company and empowers it to build a line along a route that crosses my land, the company can not exercise its franchise except by my consent, (unless, of course, it secures and exercises the power to condemn.) Before 1877 the city had no such protection. By Code Section 6448 it has. But if the city gives its consent to the laying of the track, it does not grant a corporate franchise, any more than a land owner does who gives like consent.

These matters will be further referred to when we come to consider the claim, advanced in argument but never in the pleadings, that the franchise for this line terminated in 1919. It will also be further discussed in considering the question of the surrender of the franchise and whom the surrender should be to.

THIRD PART—THE COMPANY'S CONTENTIONS CONSIDERED

I. That the Company can Cease to Operate When Losing Money.

II. Question of the Duration of the Contract

1. Whether Perpetual or Not.

2. As Affected by the Collins Park Charter.

CONSIDERATION OF THE COMPANY'S CONTENTIONS

I. The Doctrine that the Usual Permissive Charter of a Railroad Does not Give Rise to Any Obligation on the Part of the Company to Operate its Road at a loss.

This principle, as relied on by the petitioner, is not relevant. We are not counting on any implied obligation arising from the company's charter, but on its express contract of March 3d, 1903. And this is all that is necessary to be said.

But lest we be wrong in this, we submit the following views on the doctrine stated:

Until the *Brooks-Scanlon* case was decided in 1920 it is probable that many, if not most of the bar, had appraised the rule of the Dartmouth College case as meaning that the contract in a charter bound the corporation to perform at all hazards. The doctrine now under consideration, and which somewhat qualifies the supposed meaning of the Dartmouth College case, seems to have first been clearly formulated in *Brooks-Scanlon vs. The Railroad Commission*, 251 U. S., 396, and made a little more definite in *Bullock vs. Florida Railroad Commission* in 254 U. S., 513, and again in *Railroad Commission of Texas vs. E. Texas R. R. Co.*, 264 U. S., 79, and was followed and adopted as the law of Georgia in *Coffee vs. Gray*, 158 Ga., 218, decided in 1924, and in *Morris vs. Atlanta Northern Rwy. Co.*, 160 Ga., 775.

Clearly the doctrine does not mean that the grant and acceptance of a charter involves no contract at all on the part of the corporation, for in *Missouri Pacific*

R. R. Co. vs. Kansas, 216 U. S., 262, this court said,

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. *To conclude to the contrary would be but to declare that a corporate charter was purely unilateral*; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

It is equally clear that the doctrine in question has nothing to do with the case of an express contract, but relates only to the contractual duty supposed to arise from the charter. In the *Bullock* case cited it was said,

> "*Apart from statute or express contract* people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future."

This case does not negative what was said in the *Missouri Pacific* case quoted, but restricts the extent of the implied contract in this language,

> "No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the state, and have been allowed to exercise the power of eminent domain."

But it seems that the homely maxim applies that

the corporation "can not eat its pie and have it too." In the *Brooks-Scanlon* case this court said:

> "It is true that if a railroad continues to exercise the power conferred upon it by a charter from a state, the state may require it to fulfil an obligation imposed by the charter, even though fulfilment in that particular may cause a loss."

and it seems clear that the obligation here referred to means performance of the duty contemplated by its charter, and that it must so perform as long as it retains and enjoys its corporate privileges. Practically the same language as is above quoted is used in the *Missouri Pacific* case, and a like doctrine is stated in *Erie R. R. Co. vs. Board of Public Utility Commissioners*, 254 U. S., 394.

That this means that the corporation desiring to stop loss by ceasing to operate must stop entirely, seems to be very clearly indicated in *Fort Smith Light & Traction Co. vs. Bourland*, 267 U. S., 330.

Atlanta Northern Railway is a corporation, all the stock of which, it appears from this record belongs to the petitioner, but it is nominally a separate corporation. In 1924 petitioner, or the Atlanta Northern, adopted a policy exactly similar to what is attempted in the present case. In the case of *Morris vs. Atlanta Northern* already cited, the Supreme Court of Georgia, following the cases above cited, sustained its right of the corporation, if losing money, to quit, but said in a case where there was no special contract,

> "If the defendant company had discontinued the operation of a part of its line and dismantled the same or was threatening so to do a different

question would arise, and the rulings made in the case of Ft. Smith Light & Traction Co. vs. Bourland, supra, and the case of Macon Railway vs. Corbin, supra, would be applicable."

The case of *Macon Railway & Light Co. vs. Corbin*, 155 Ga., 197, differs from the Morris case in this, that there was there, as here, an express contract, so that the ruling was not based on mere charter implication; but it is, for that reason, *argumentum a fortiori*, though more exactly pertinent to the City's own case as set forth on page 20 *supra*; but it is worth noting the principle expressed in the case in this language:

"Under the above contract, the street railway company cannot retain and enjoy the right granted to it under the resolution without complying with all of its obligations in such contract, and can not abandon a portion of its line of railway, while retaining and operating another portion under the grant from the county commissioners. So long as the company retains any of the benefits it must perform all the obligations imposed by the contract."

Upon considering the foregoing it will be apparent that so much of petitioner's answer as begins on page 80 of the printed transcript and embraces paragraphs 10 to 16 inclusive was an effort to anticipate what was said in the Fort Smith case and in the two cases cited from 155 and 160 Georgia.

In the case of *St. Louis & San Francisco Rwy. Co. vs. Gill*, 156 U. S., 649, the rule had been very clearly stated that in estimating earnings and expenses in order to determine the reasonableness or unreasonableness of a rate or requirement of law, regard must be had to the whole road and not to a part, and in *Puget Sound*

Traction Light & Power Co. vs. Reynolds, 244 U. S., 574, this court had quoted from *Gill's* case and reaffirmed the following language,

> "That the correct test was as to the effect of the act on the defendants entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; * * * and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses."

In the present case petitioner seems to rely on what it conceives to be a contrary view expressed in *Northern Pacific vs. North Dakota*, 236 U. S., 585; but exactly the same situation arose in the *Puget Sound* case and this court, referring to the *Northern Pacific* case, said there:

> "In our opinion, that decision is inapplicable, the present case being controlled rather by St. Louis & S. F. R. Co. vs. Gill, 156 U. S. 649."

Arguments of Petitioner that the Line in Controversy is not Part of a System.

The expressions of the Georgia court in the cases cited from 158 and 160 Georgia and of this court in the *Fort Smith* case in 267 U. S. so far limit the rule laid down in the *Brooks-Scanlon* case and others as apparently to give petitioner some concern.

Unable to deny that it is earning substantial profits on the "system" it was chartered to operate, and of course unwilling to give up this lucrative "system," petitioner falls back, in its original answer in paragraphs 10 to 14 inclusive, on this unique argument:

> "By the act of 1907, incorporated in Code Section 2662, the power granted in that act to the Public Service Commission to regulate fares made an exception as to those cases in which there were or might be contracts on the subject of fares, and forbade the Commission to impair such contracts. Therefore, as the Commission is forbidden to impair this contract, the legislature has taken this road out of the system and left the defendant companies free to impair it themselves."

That is a perfectly fair and accurate translation of the contention made. I can not answer it. My mind, I think, is logical, and I just don't know how to seriously argue such a proposition. I can only state its legal equivalent thus:

> "A contracts to build me a house and gives me a bond to comply with his obligation. Damage having arisen, I sue him on the bond. He answers that he has elected to set aside the contract and argues thus: 'The Constitution of the United States forbids any state to impair the obligation of a contract. Therefore the State of Georgia can not by law repeal my contract and relieve me of my bond, and it has forbidden its courts or its commission to do so. It follows that I have a clear legal right to set it aside myself.' "

That is a perfectly parallel argument. If it does not answer itself, I can't answer it. Perhaps, however, it is pertinent to repeat here what we said on page 11

supra, that the Act of 1907 left this and all other lines having contracts, subject to the commission in all respects except that it prohibited impairment of the contract.

For a like reason, and with the additional purpose to show that its contract was legally applicable only to a part even of this line, in paragraph 15 of the original answer petitioner, (*p. 85,*) put up two other arguments.

First, it argues that there were several entirely separate lines, constructed under what it is pleased to call "franchises" from Atlanta, Edgewood, Kirkwood, DeKalb County and Decatur. But the record shows that it was one line and was always so treated, and, even if they were separate lines, this court has indicated in the *Puget Sound* case, already cited from 244 U. S., that that fact is wholly immaterial, saying:

> "Plaintiff's brief contains some general attacks upon the effect of the Commission's order in requiring plaintiff to carry passengers over portions of 'separate and distinct franchise routes' upon payment of a single fare. This criticism is not well founded. Even were the several portions of its lines separately owned, they being operated practically as a single system, it would be within the bounds of reasonable regulation to establish through service and a joint rate."

Moreover, petitioner itself has expressly negatived any such contention in the very language of the contract. On page 20 *supra* we quote language from the contract as shown on page 16 of the transcript, expressly defining the line affected as extending "from the terminus in Atlanta to the terminus in Decatur."

Similar language is shown in the same contract on page 15 of the transcript.

Second, it argues again, in the same paragraph of the answer, that it could not offer to surrender to Decatur but half the "franchise" even inside the city, because the other half of it was based on a franchise granted by DeKalb County through territory afterwards incorporated in the town. Again they are in error. Such jurisdiction as the county had over the rural territory passed to the town when the territory was incorporated. In *Almand vs. The Atlanta Consolidated Street Railway Co.*, 108 Ga., 417, the Georgia Court ruled on a situation almost identical, and said at page 427.

> "The moment that the legislature created the municipal corporation and gave it jurisdiction and control over its streets and fixed the limits of the corporation so as to embrace therein as one of its streets a part of what was formerly a county highway, the jurisdiction of the county over this part of the highway ceased, and the same became subject to the control and jurisdiction of the municipal authorities."

All this is, of course, irrelevant. The City does not grant any franchise at all. As we have attempted to make clear in this brief in pages 35 to 39 *supra*, the City's connection with the franchise is exactly that of a private landowner, no more and no less. And this truth is recognized in the decision under review in language quoted on page 36 *supra*.

The more we examine this contention of the company that the line in question is no part of the "system, the more remarkable it appears. For note the situation

and attitude of the parties before this suggestion crept into the record.

The lessor company was chartered in 1902 for the express purpose of making the line part of a "railroad" to be 140 miles long, and part of a "complete system." The very contract in question is reconcilable with no other theory. The charter of the lessee company in 1911, after the act of 1907 was passed, stipulated that it was to be part of a "system" some two hundred miles long. The twenty million dollar mortgage covered the "system." The lease of 1912 not only so treated it, but expressly stipulated that the lessee should adhere to the contract. The history given in the agreed statement of fact is reconcilable with no other theory. The Green affidavit (*transcript page 53,*) shows that it was notoriously operated as a system. The very pleadings of the defendant show it, notwithstanding the argumentative denial in paragraphs 10 to 16.

Even after the last named issue was attempted, the Butler affidavit itself is reconcilable with no other theory.

So of the effort to argue that the road was dependent on the so called "franchise" of 1899 to the Collins Park Company. Aside from the legal facts which demonstrate as already pointed out, that that consent became *functus officio* when the Electric Company, in 1902, by express statutory authority, bought out the property and consolidated it with its system, the fact stares us in the face that in the very correspondence which constituted the present effort of the company to violate its contract, the company itself stated that after the purchase of the line, the City, in 1903, "amended"

said "permit or franchise" and granted it an additional permit, (*transcript page 43*).

II. Question of the Duration of the Contract.

1. As Affected by its Alleged Perpetuality

The petition for certiorari begins with the following inaccurate statement:

> "The City of Decatur * * * * * brought an equitable petition * * * * to enjoin the street railway companies from ceasing to operate its (their) lines * * * * within the limits of the Town of Decatur, and to perpetually compel operation thereof at a five cents rate of fare," etc.

The record shows, (*transcript page 76,*) that there was no prayer for perpetual operation, but merely for an injunction against a present violation of a contract. The statement challenged seems, therefore, to represent an argument in the minds of counsel rather than an accurate reading of the City's petition.

While we think the contract did contemplate perpetual operation, or, at least, duration as long as the corporate life of the contracting company, that question is not now involved.

The constant iteration in the petition and brief alike of the formula, "perpetual, never ending," etc., would, by its needless frequency, impress the mind as verging on the ludicrous, if it were not manifestly intended as an appeal for sympathy, but the question it seeks to raise is wholly academic. The contract having been but recently adjudged to be "valid and subsisting," and one of the parties threatening to

violate it, a petition against a present breach hardly involves the question of its future duration.

Discussion of the Academic Question.

While we ourselves think, therefore, that the question is not in the case, we reply to the argument.

No such question as any alleged perpetuality or indefiniteness in the contract was made by the pleadings in the trial court, and there was no specific assignment of error on the subject in the Georgia Supreme Court. Indeed this thought was never heard of until the petition and supporting brief were filed in the certiorari case. Nor can we deduce now from petitioner's present brief, just exactly what the point is that it seeks to make; that is to say, whether they are asking this court to hold that the contract is ambiguous or indefinite in duration; or that it is not perpetual; or that it is perpetual and therefore void as against public policy.

If the terms of a contract are ambiguous as to its duration, it would no doubt be competent for a trial court, upon proper pleadings, to construe it as limited to some special time otherwise deducible from the pleadings or evidence. It might possibly, in such a case, be, that a court could properly give the benefit of a doubt against the perpetual theory. That we think was the *ratio decidendi* in the *Texas Pacific* case cited by petitioner from 136 U. S. from which we quote as follows:

> "Such a contract, while we do not say that it would be void on the ground of public policy, is undoubtedly so far objectionable as obstructing

improvements and changes which might be for the public interest, and is so far a hindrance in the way of what might be necessary for the advantage of the railroad itself and of the community which enjoyed its benefits, that we must look the whole contract over critically before we decide that it bears such an imperative and such a remarkable meaning."

So again, if it is indefinite as to time, it might, perhaps, be held terminable by either party on reasonable notice and equitable terms, but here again it would be needful that there be some sort of pleadings to justify a court in acting, and there ought to be some assignment of error invoking a review of that question, before an appellate court could be said to have committed error itself in failing to pass on the question.

It is conceivable that a contract might be in terms perpetual, but so based on some element of personal confidence as to make its provisions repugnant. In such a case, a trial court might on proper pleadings impose an equitable limit on its duration.

There may be many other such possibilities, but all dependent upon proper pleadings and assignments. We know of no precedent or legal principle for what the petitioner is vaguely seeking here. Indeed we question whether counsel for petitioner can even now accurately define their own position.

On page 21 of petitioner's brief, it is said that

> "This court has repeatedly held that municipal rate contracts do not compel perpetual and never ending operation."

We question the accuracy of this statement, which seems to us a little extravagant. The *Texas Pacific* case, which petitioner principally relies on to justify the statement, merely interpreted the contract and held that "permanent" is not synonymous with "perpetual." In view of that fact, we submit that so much of that case as discusses the remedy of specific performance, and holds that redress should be sought at law, is *obiter*. Indeed, the expression of the court on that subject was hypothetical only.

The well known doctrine of chancery that its extraordinary remedies are discretionary, hardly touches the question of substantive right. In the *Texas Pacific* case this court was reviewing a lower court of the Federal system, and could very properly hold that, as a matter of discretion, the parties should be left by chancery to the remedies at law. We would doubt whether a similar review of a state court would be competent. In remedies, it is the *lex fori* that should be considered. Where a state court gives effect to substantive rights, remedies are for it to administer.

We can see no federal question in any view of this attempted issue. We know of no principle upon which any court, state or federal, can hold that a contract is invalid because made for too long a period.

The subject was considered in *Franklin Telegraph Co., vs. Harrison*, 145 U. S., 459, and that case was so similar to the present, in so many respects, that it seems to us the only authority needed in this case. The case of *Western Union Co. vs. The Pennsylvania* Co., 129 Fed. Repl, 849, is also quite similar; and because of its exhaustive examination of all the precedents, is an invaluable document. On page 25 *supra*

we have already quoted freely from the *Harrison* case on the general merits, but it also discusses the subject of duration, as well as of remedies at law and in equity. We rely strongly on it.

As already stated, it is not clear whether petitioner claims the contract to be for a time less than perpetual, or to be void as against public policy, because it *is* perpetual. If the latter theory is the one intended, we submit that public policy is a matter for each state to determine for itself. The common law doctrine against perpetuity in landed property is probably of force in all the states, but if it were abolished by law in Georgia or held inapplicable by the Georgia Court in a given case, we think it would not raise a federal question. The same would be true in respect of the well known doctrine that totally avoids a contract, unlimited in time or place, to abstain from a particular business. Under normal conditions these would hardly give rise to any federal question.

But petitioner seems to think that the duration of the contract raises some vague federal question because of the allegation tnat the contract rates are less than the cost of service. The contention is so manifestly irrelevant, that we feel compelled to apologize to the court for answering it. Whenever it is properly raised as a legal issue, we will meet it by legal evidence and pertinent argument, not passively but aggressively, not as oppressor but as victim. Meanwhile this court has already, in 262 U. S., declared the question irrelevant here. In the face of that definite ruling, we have not even felt it necessary to call attention to the utterly perfunctory character of the Butler affidavit, and the absurdity of its conclusions. In view of their total disregard of the spirit of the

ruling in *Dow vs. Beidleman*, 125 U. S., 680, and its complete suppression of any and all information as to how the conclusions of the witness were reached, not to speak of the hearsay character of the Beeler Report interjection, we assume that no court would attach the slightest importance to that testimony, even if it were relevant. Because of its complete irrelevance we did not even complain in the appellate court of its admission, and it is evident that neither the trial court nor the appellate court attached any importance to it.

But, recurring to the theory of petitioner that the contract is void as against public policy, and assuming that to be a federal question, petitioner overlooks the fact that if that were true, it would be void *ab initio*. But how can that be when the state courts and this court have all held that it was not void *ab initio*, but was "valid and subsisting for at least twenty-two years after it was made.

Between the dilemma of claiming that the contract is not perpetual, or that it is void because it is perpetual, petitioner has suggested the existence of a little intermediate horn on which to hang a hope. In clause *d* of paragraph 6 of the petition, it invokes a ruling to the effect that a municipal corporation can not make a contract "grossly unreasonable in point of time," and says in terms that it is "entitled to have this court so determine." (*See page 9 of printed petition.*) If that were a federal question, it is not possible to see how it could be availed of here as a matter of original jurisdiction, nor anywhere else without appropriate pleadings and some suggestion on which issue could be joined, as to what period of time is or is not "grossly unreasonable."

It is not possible to find in the entire record, anywhere, until the petition for certiorari was filed, any pleading that would give the City of Decatur notice of such a hope held by the company or any opportunity to offer evidence or be heard on the subject. And yet, as all such public utility concerns do, they talk incessantly about "due process of law", apparently never conceiving that the City of Decatur is just as much entitled as they are to the shelter of that aegis.

What petitioner is seeking here, is not the correction of any error anywhere along the line up which this case has painfully travelled; but, in their own literal words, "to have this court determine" that their contract, freely, deliberately, and at their own request, entered into with the city, shall be made over for them by this appellate court, and without even hinting at what its duration should be, or in what other respect it should be reformed.

2. As Affected by Termination of the Collins Park Charter

In addition to its undefined complaint about the "perpetual and never ending" obligation of its contract, petitioner is setting up a claim to the effect that, because the line in question was ostensibly built by the Collins Park Company, and because the corporate existence of that company ended in 1919, the obligation of this contract with a different company should be construed as ending at the same time. To this obviously illogical proposition there are several replies.

First, it is not established that the Collins Park Charter terminated in 1919. Certainly, under normal conditions, that would be the presumption of law. But

when no such defense was set up in the pleadings, it may well be doubted whether such a presumption would exist. For Code Section 5635 requires the defense to be "plainly, fully and distinctly" set forth; Section 5636 is even more explicit and requires all matters in satisfaction or avoidance to be specially pleaded; and the case of *Johnson vs. Ballingall* in 1st Georgia, quoted on page 34 *supra* excludes consideration of any such defense in the trial court, as to the discharge of a contract, unless so pleaded. It is clear therefore that the city had no notice of any such claimed ground of discharge, and would have been out of order to have offered evidence to show that the *de jure* corporate life had been extended, as was expressly authorised by law. We assume therefore, as the question was not made either in the pleadings or in the assignments, that this court will not now entertain such a presumption.

Second, If it be held otherwise and that the corporation did cease to exist *de jure* in 1919, the failure to raise such question in the pleadings or otherwise in the trial court, and the failure to make any such assignment of error in the Supreme Court of Georgia would preclude consideration of it here. There is nothing here in the way of any record or certificate that any such question was ever made in the State Supreme Court, and the language of the opinion, as shown on page 102 of the transcript, clearly indicates that it was not made.

Third, There is absolutely no reason why the Collins Park Charter is to be considered in the matter at all. In 1902 it had sold out all its phycical properties to the Georgia Railway & Electric Company. There was express legislative authority for such a company,

incorporated under the general law of 1892, to buy such old lines and consolidate them with its system; the Georgia Railway & Electric Company had been legally incorporated for 101 years for the express purpose of buying this very line and making it part of the "system" it was proposing to create; and it had so bought and consolidated.

After that, the Collins Park Company faded out of the picture. The contract was not made with it, but with the Georgia Railway & Electric Company, predecessor of and identical with the present Georgia Power Company. Manifestly the Collins Park Co. was not in the contemplation of the parties when the contract was made. Neither was it in the eye of the law. After it had nominally built this line and conveyed it to petitioner, it was *functus officio*. It may not have been dead *de jure*, but it was dead *de facto* when this contract was made. Possibly the manner of its taking off was not according to the statutes for such cases made and provided. Mayhap its dying at corporate headquarters was irregular, but we know of no principle in legal pathology that makes death void for irregularity.

Fourth. It is argued that, even if the contract was not made in contemplation of the Collins Park Charter, the "franchise" was granted by the City in such contemplation, and therefore the subsequent contract must be so construed because any other view would extend its franchise in the streets to the hurt of the City. The argument is fatally vulnerable. For not only did the state authorise the transfer of the corporate assets of the Collins Park Company to the Georgia Railway & Electric Company, and extend its rights for 101 years, but the city itself, by express

covenant, gave consent thereto, and even enlarged its consent to a double tracking, (*see transcript page 16, "Fourth".*) If this was not a mutual and express abandonment of all consideration of the Collins Park consent, (inaccurately styled a franchise,) by both parties, it would have been a complete estoppel against the city. What says the Supreme Court of Georgia on the subject?

> "Regardless of whether the assignments of error in the bill of exceptions raise the question of the expiration of the charter of the Collins Park and Belt Railroad Company, so that it can be considered by this court, it is clear that the City of Decatur, under said contract, could not deny that it had given its consent to the construction of this street-railway system upon its streets."

Indeed it may well be doubted whether the consent of the city was necessary under the constitutional requirement of Code Section 6448. What that requires is the consent of the city to the "construction, not to the subsequent maintenance or continued use, and, of course, the limitation on the legislative authority thus imposed will be strictly construed. It was said in *Floyd County vs. Rome St. Rwy. Co.*, 77 Ga., 619, that the consent once given is "irrevocable."

When the City gives its consent to the "construction" of a street car line under the right thus reserved to it by 6448, the condition is complied with. The power of the city is at an end. Whether the constructing company continues to operate the line or sells it out to another company is no concern of the city. The "construction" had taken place. ***And this plaintiff in error would be the last to question that fact.***

That these views, including the company's own attitude on the question, are indisputable, appears in many ways, and in no way more conclusively than in the fact that the new company bought the line from Collins Park without any consent from the City, and was operating it under authority of its charter from the state without receiving or asking the city's consent, and without any question made by the city, until the contemplated double tracking made a supplemental consent necessary, a consent which the company itself refers to as an "additional permit," in its letter of Sept. 26, 1925, shown on transcript page 43.

Fifth, From that time until 1925, as alleged in paragraph 17 of the suit, (*transcript p. 70*), both parties lived up to and acted on this theory, (except when the company attempted in 1920 to violate the contract,) and both treated the duration of the contract as continuing as long at least as the corporate life of the new company. No suggestion to the contrary was ever heard until the decree that is now under review was entered Sept. 15, 1928, (*transcript page 96*).

And these facts naturally bring up the matter of the previous adjudication and its effect, as specially pleaded by the city. (*See transcript page 74 par. 29*).

The Question of Res Judicata

That the former cases, already abundantly before this court, conclude all the questions in this case, and especially the matter of the Collins Park charter, is manifest. For, if the contract of 1903 terminated in 1919, as now for the first time set up, it had terminated and that fact was available for defense, when the former litigation began. As already stated, (see page 13

supra,) that litigation grew out of the company's notice on October 5th, 1920. It has, therefore, been adjudicated that the contract did not terminate on August 16, 1919.

Of course it would be futile for the petitioner to say now that the issue was not made in the former litigation. For, if it was not made it could have been, and it is not only established by the Georgia decisions of *Hollinshead vs. Woodward* 128 Ga., 7, and *Watkins vs. Lawton*, 69 Ga., 671, that this is the same thing, but by numerous cases in this court, of which it is sufficient to refer to *N. Y. Life Ins. Co. vs. Bangs*, 103 U.S., 780, from which we quote as follows:

> "When an action at law is brought upon a contract, the defendant who denies its obligation, either from fraud, payment or release, or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration."

On page 7 of petitioner's brief it is mentioned as a fact that the former record "was not introduced in evidence." Whether the trial court, the Supreme Court of Georgia, and this court are therefore precluded from taking notice of their own records is not a question we feel invited to discuss. Possibly there may be some such bare technical piece of legalism. We do not know. But the facts of that litigation are all within the actual knowledge of the court and constantly referred to in petitioner's brief, and we hardly suppose that, in a review upon certiorari, this court will remand a case when but one result can follow. If judicial precedent for such a view is needed, we submit that the spirit of the last paragraph of the opinion in the *Brooks-Scanlon* case is ample.

FOURTH PART—THE PETITIONER'S CONCEPTION OF EQUITY

Candid analysis of the petitioner's attitude may be thus nakedly stated:

> "The contract was made at our instance and at our urgent request. It was binding on Decatur from the beginning; but, being grossly unreasonable in point of time, was never binding on us. While it was void as an obligation on us, *ab initio*, and therefore never binding on us, it ceased to be binding on us in 1919 by operation of law. It ceased again to be binding on us in 1925, when we offered to cease being bound by it.
>
> "But, although it never was binding on us, and has twice ceased to be binding on us, we now desire to be relieved of the operation of this part of the system we were chartered to operate, and which we contracted to operate; and therefore, in a large and liberal spirit of equity, we offer to quit being bound to operate it.
>
> "Since the Georgia courts have forbidden us to violate the contract, we now submit that we are 'entitled to have this court determine,' (*see printed petition, page 9, subparagraph d,*) that the town had no legal authority to make such an unreasonable contract, notwithstanding the decision of the Georgia court in the 149th Georgia that it did have that authority; and further to determine that, therefore, the Supreme Court of Georgia erred in failing to consider a question of mere state law that was not before it; and in failing to reverse the trial court for not considering a question that was not before it; and in failing to reform and reshape a contract when there was no prayer before the court for such reformation, and no pleading looking to such course.
>
> "So far as concerns the suggestion that all the questions in this case have already been adjudicated, and so far as concerns the fact that this court

has already decided that the controversy contains no question growing out of the 14th amendment, we are unable to make any answer at all, and we therefore keep silent on these matters; but we are dissatisfied with our bargain, and still insist that, through our own contract, we are deprived of our property by the State of Georgia without due process of law.

"And, in support of this contention, we can and do prove by Mr. Butler, that an unnamed auditor once told the public Service Commission of Georgia certain ultimate facts, and that one John A. Beeler of New York once told the City of Atlanta certain other ultimate facts, and that Mr. Butler deduces from these assertions a conclusion that the company is losing money on this line, although he admits in the same breath, that it is earning a substantial profit on the 'system'. In view of all this, we feel that we should be relieved of our bargain."

This is a perfectly fair statement of the Company's position as deducible from the record and its brief. It is here expressed more nakedly than they express it; perhaps, we might say, more baldly, but that is, in its substance, exactly what they say; and it is a fair presentation of their conception, not only as to what is law, but of what is equitable and moral.

There is, however, yet another phase to the equity of this case. It is elementary that, where one desires his bargain set aside by a court, there should be a restoration of the *status quo ante*. Petitioner is here admitting, in substance and effect, that, before it can be permitted to abandon a duty growing out of its franchises, it must surrender something. This is a crude and narrow application of that broader principle of equity which demands, in any case, that there be

restitution before cancellation. To apply that principle merely to a franchise obligation, is the narrowing of a large doctrine. In any kind of case there must be restoration, and it is always true that there can be no absolution unless restitution can be and is.

The people of Decatur had a car line. This record does not inform us how they got it. They may have built it out of their own narrow means and given it away, or they may have given inducements to others to build it, or they may have gotten it in any one of a number of possible ways. But it was there, and they had built their homes and adjusted their affairs on the strength of it. Somehow, this company or the predecessors out of which it was evolved, got possession of that line and proceeded to tear it up, to the injury of the people as they claimed, and without due process of law.

Litigation followed, and the record shows that this company was urgent in begging for permission to kill the little ewe lamb, and profuse in promises and offers. The town that hesitates is lost, and Decatur yielded; the compact was carefully worded; the line was torn up—not into Atlanta, so as to leave a route by which a new line could be constructed—but out of Decatur, so that the people could not get to Atlanta that way.

Now it is proposed to do the same w th this line. If the Decatur end is cut off, not less than 12,000 people are left where they can be coerced into a consent that their contract be cancelled, or be cut off from this access to their daily business, with no practical way shown by which they can reach it, and no route pointed out upon which they can build them another line. It was, no doubt, to this fact that the Supreme Court

of Georgia referred in the second head note, when they said that the law makes a valid contract "effective according to its terms," and added this:

> "And that principle is especially applicable in this case, because, if the contract is set aside or ignored, the situation of the parties anterior to the contract and at the time of making the same can not be restored."

APPENDICES

A—THE MATTER OF THE PAVING CHARGE
B—ASSIGNMENTS OF ERROR IN GEORGIA PRACTICE

APPENDIX A.

MATTER OF THE PAVING CHARGE

As already stated on page 28 *supra*, we do not consider this question before the court, but present the local law about it in an appendix to be considered if the court thinks it necessary, otherwise to be ignored.

The so called "affidavit of illegality" is a branch of our local jurisprudence about which has been collected a large body of judicial decisions. It was originally intended to apply only as a substitute for equitable protection against efforts to enforce normal executions based on judgments, where the judgment had been satisfied, or the execution was, for any other reason proceeding illegally. The original charter of its authority is in Code Section 5305 as follows:

> "When an execution against the property of any person shall issue illegally, or shall be proceeding illegally, and such execution shall be levied on property, such person may make oath in writing, and shall state the cause of such illegality, and deliver the same to the sheriff, or other executing officer, as the case may be, together with bond and good security for the forthcoming of such property, as provided by this Code"

Briefly stated the practice then is that the levying officer shall return the execution and affidavit to the next term of the proper court, where it has a preferred order, the papers so returned constituting the pleadings, the allegations of the "illegality" being taken to be true unless properly traversed. No matter prior to judgment can be heard except want of service. The proceedings are speedy, elastic and economical, the

case being regarded as in the nature of an equity cause.

Quite a large body of jurisprudence has been evolved out of this practice, in the way of authorising *ex parte* judgments and summary executions, with appropriate right to defend by affidavit of illegality. Chattel mortages for instance can be foreclosed and executions issued thereon by *ex parte* affidavit, under Code section 3286, the mortgagor being permitted by Sec. 3289 to file affidavit of illegality setting up any defense he could have interposed in a suit.

By a long train of innumerable statutes, mostly affecting municipal corporations, foreclosure of statutory liens for street paving, sewers, and other local improvements, is so permitted by *ex parte* affidavit, and means of defense afforded on like terms as in the case of chattel mortgages.

In respect of the paving system given to the town of Decatur by the Act of 1919, as alleged in petitioner's answer, defense was so provided in the following language appearing on page 936 of the act:

> "Provided, however, that the defendant railroad company shall have the right to file an affidavit denying that the whole or any part of the amount for which the execution is issued is due, and stating what amount, if any, it admits to be due, which amount so admitted to be due shall be paid before the affidavit shall be received; which affidavit, when received, shall be returned by the marshal of said town to the Superior Court of DeKalb County, and there tried and the issue determined as in the cases of illegality, subject to all the pains and penalties provided in cases of illegality for delay."

With this brief outline and exposition of the Georgia law touching the assessment complained of, and the statutory method of defense, we note the following facts as to the present case:

1. The liability, if it exists, does not differ from any other expense to which the company is exposed by the nature of its business. It stands on the same footing, *quoad* the matter of profit and loss, as taxes, maintenance of way, and other expenses.

2. It is not pleaded as a defense to the city's case, or as any reason why the city's case is not good, but as a cross bill seeking independent relief against an alleged illegal charge, on the ground that the paving law is unconstitutional.

3. It is the only matter at any time presented in this case that raises a federal question. It is the only matter of defense pleaded at all; except the general denial and the irrelevant matters in paragraphs 10 to 16 of the answer, which seek to separate the line from the system in order to escape the *Fort Smith* case. It is the only defense assigned as error in the Supreme Court of Georgia, except the general denial. It is not assigned as error here at all and is not argued in the brief.

4. If the law is unconstitutional as alleged by the company, it is to be presumed that it will not be an expense at all, and therefore can not add to or "aggravate" the company's alleged losses. For this reason it can not have any bearing on the city's case.

It may be gravely questionable whether such an unrelated and independent matter should be allowed

in a case already too much laden with legal questions. But multifariousness is a discretionary matter, upon which no hard and fast rule can or should be enforced, and the matter was not stricken in the trial court. But the principles of law upon which defense is allowed against these improvement charges are well established, and nothing is better settled in Georgia than this, that where statutory and *ex parte* assessments like this are levied, and defense allowed by way of "illegality," no other remedy is available.

The proposition has been so often laid down in Georgia that it would be useless to cite all the cases. The two following are sufficient:

Rice vs. Macon, 117 Ga., 401.
Gainesville vs. Dean, 124 Ga., 750.

Among a host of other cases may be mentioned *Hart u Lazaron*, 46 Ga., 396; *Ansley vs. Glendening*, 56 Ga., 286; *Russell vs. O'Dowd*, 48 Ga., 475; *Hitchcock vs. Culver*, 107 Ga., 184; *Roney vs. McCall*, 128 Ga., 249; *Mathews vs. Gelders*, 129 Ga., 103; *Williams vs. Kennedy*, 134 Ga., 339; *Smith vs. Murphy*, 140 Ga., 80; *Daniels vs. Rosenheim*, 152 Ga., 278.

The above cases apply to illegalities against executions based on judgments. Among similar cases, where the execution was an *ex parte* proceeding for the collection of street improvement assessments, besides the two already specially cited may be mentioned, *Regenstein vs. Atlanta*, 98 Ga., 170; *Lanham vs. Rome*, 136 Ga., 398; *Waycross vs. Cowart*, 164 Ga., 721; *Cotton Mills vs. Social Circle*, 163 Ga., 465.

It is clear, therefore, that the injunction sued for

by the petitioner to enjoin the assessment was not maintainable as a matter of state practice, and that there was a complete remedy at law. No injunction temporary or otherwise having ever been granted, the normal expectation would be that the city has proceeded and that the company has either paid the assessment or filed its affidavit of illegality. If the former happened, the question is now moot. If the latter, then the issue has had its day in court, and either has been ended, or is on its way here by some other road.

To the suggestion in the pleadings that the paving law is unconstitutional, which is the only federal question in this entire case, the complete answer is that the law of Georgia affords an ample method for determination of the question, and that injunction is not that method. In refusing that injunction the Georgia courts have not decided as to the validity of the law, but have merely suggested to petitioner to implead its adversary in the proper way.

APPENDIX B.

ASSIGNMENTS OF ERROR IN GEORGIA PRACTICE

At page 32 of the foregoing brief we stated several principles which we conceive to be established law in Georgia relative to the assignment of error. The following citations and quotations it is believed will be found to fully sustain the statements there made and to constitute a complete demonstration that, as to most of the argument now presented by petitioner, the Supreme Court of Georgia did not consider, and could not legally have considered such matters at all.

By the Constitution of Georgia, (Code Section 6502,) it is provided as follows:

> "The Supreme Court shall have no original jurisdiction but shall be a court alone for the trial and correction of errors of law, etc."

By Code Section 6203 it is provided as follows:

> "The Supreme Court shall not decide any question unless it is made by a special assignment *in the bill of exceptions*, etc."

The appellate practice in Georgia is very simple. The bill of exceptions may or may not include a brief of the evidence, according to circumstances. In the present case it did. But the statute, (Code Section 6139,) contains the following:

> "Such bill of exceptions shall specify plainly, the decision complained of, and the alleged error and shall be signed by the party, his attorney or solicitor."

Code Section 6140 contains the following:

> "If the case is not one in which a judgment on a motion for new trial is to be reviewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, and shall incorporate in the bill of exceptions a brief of so much of the written and oral evidence as is material to a clear understanding of the errors complained of, and shall specify therein such portions of the record as are material to such understanding."

Code Section 6145 prescribed the form of certificate

to the bill of exceptions, and Section 6146 is as follows:

"This certificate shall be the writ of error."

By sub section 3 of Code Section 6140 it is provided as follows:

> "The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of."

In addition to the extreme simplicity of this system, it will be noted that the assignment of error in Georgia is not *ex parte* as it is in the federal practice, not a mere memorandum of the plaintiff in error, but a part of the official record and must precede the settling of the bill. It not only constitutes notice to adversary counsel and pleading in the appellate court, but informs the judge whose decision is to be reviewed just what the error is, and gives him opportunity under the provision last above quoted, to advise the appellate court of any material fact as to the proceedings before him.

In other words, if, in the trial court, there was nothing about the Collins Park charter, or the perpetual duration matter, even in argument, and no motion or suggestion on these or any other matter complained of, and error was assigned on such a subject, it would be both the right and duty of the trial judge to so certify. It has been held also that, if relevant matters are omitted, the judge may require counsel themselves to make the proper correction. (See *Covin vs. Willis*,

19 Ga. App., 259 and *Brinson vs. Callaway*, 112 Ga., 162.)

Other statutes *in pari materia* are Code Sections 5181 and 5199 relating to practice in certiorari, in the former of which it is provided,

> "In which petition (i. e., for certiorari,) he shall plainly, fully and distinctly set forth the errors complained of."

and in the latter,

> "No ground of error shall be insisted upon, on the hearing which is not distinctly set forth in the petition."

The complete identity in principle of these provisions in certiorari cases with the statutes cited as to the writ of error is obvious. But in *Citizens Bank vs. Paris*, 119 Ga., 517, the Supreme Court said,

> "The certiorari statute provides that the petition shall plainly and distinctly set forth the errors complained of. The requirement of this statute is very similar to that for bills of exceptions, and the principle of the decisions above cited would apply to petitions for certiorari.

So that the decisions as to either of these matters of appellate pleadings, defining what is meant by plainly, fully and distinctly setting forth the error, or by the formula, "shall specify plainly" etc., is applicable to the other. Among such decisions we mention the following:

The Court of Appeals said in *Palmer vs. Ingram*, 2 Ga. App, 200, that

> "An assignment of error must not only plainly specify the decision complained of, *but must point out the error in such decision.*"

and again in *Wall vs. Hawker Poettry Co.*, 27 Ga. App., 255, it was said,

> "Assignment of error must be specific, whether contained in a bill of exceptions or in a petition for certiorari, and, when based on a decision of the trial court, must specifically point out *the reason why the decision is error.*" (Italics mine)

In the case of *Warren vs. Oliver*, cited in the above mentioned authority, from 111 Ga., 808, it was held that an assignment not so complaining could not give the Supreme Court jurisdiction, and that the bill of exceptions would be dismissed.

So in *Clements vs. McCormick*, 115 Ga., 852, the Supreme Court quotes from *Hayden vs. The State*, 69 Ga., 731, this dictum:

> "The plaintiff in certiorari must allege error so distinctly that a reviewing court may understand the ground of error relied on."

In *Kimball vs. Williams & McCurdy*, 108 Ga., 812, where the question at issue was submitted to the judge on law and facts and was decided in favor of the plaintiffs the defendant's assignment of error was, "To which ruling and judgment the said defendant excepted and now assigns the same as error." This language it was said presented no question for determination, and, on this authority, it was said afterwards in *Wheeler vs. Worley*, 110 Ga., 513:

> "Conceding that it may be gathered from the present bill of exceptions that the plaintiff in error seeks to bring under review, not an erroneous finding of fact, but an error of law committed by the trial judge in reaching his conclusion upon a state of facts as to which there was no controversy, it still remains true that such alleged error of law is not plainly and distinctly pointed out."

to which saying it was added:

> "Indeed, it is not pointed out at all, and only by a resort to the brief of counsel filed in behalf of the plaintiff in error can the nature of his complaint in the premises be ascertained, or more than vaguely surmised."

a saying that is singularly applicable to the case now under consideration. For we never heard of such a question nor dreamed of it until we saw the brief in the Supreme Court of Georgia, and the trial judge has never heard of it or passed on it to this day. And we make bold to say that no hint or suggestion of such an issue can be found in the record.

There is, in Georgia, a recognized practice under which, upon review of a motion for new trial or judgments on matters of demurrer, one very general assignment of error will, reach to and adopt each and every of the grounds of the motion or demurrer, but this is exceptional, and it is definitely established that it has no application in a case like the present.

Thus in *Callaway vs. The City of Atlanta*, 6 Ga. App., 354, a penalty had been imposed in excess of a city ordinance and the assignment was that the judgment was contrary to law. The court of appeals held that

this assignment was not sufficiently explicit to warrant consideration because it did not specifically point out any reason why it was contrary to law. Anticipating, however, the distinction referred to above, the court said,

> "It may be necessary to add that we are not speaking of the method of assigning error upon the action of the court in overruling motions for new trial, demurrers, and similar pleadings, in which the specific grounds are definitely set up."

So, in the case of *Mutual B. & L. Assn. vs. Glessner* 99 Ga., 748, it was said:

> "The difference between this case and those where general assignments of error are made upon the overruling of motions for new trials, is obvious. In such cases the grounds of the motion usually point out the errors which the movant claims were committed at the trial. When this is properly done, alleging error in denying the motion brings under review the correctness of the rulings or decisions of which the motion complains. But where a judge trying the case upon the law and the facts disposes of it in a single judgment with which the losing party is dissatisfied, the latter in excepting to it ought certainly to give some intimation of what the error consisted. Simply saying, in effect, that such a judgment was wrong, without stating any ground or reason why it was so, opens a broader field of investigation than our law, which requires all errors to be plainly and distinctly set forth, authorizes. It was never contemplated that this court should search around in a loose and general way to discover errors not brought to its attention with, at least, a reasonable degree of clearness and perspicuity."

The cases of *Patterson v. Beck*, 133 Ga., 701 and *Wood vs. Wood*, 147 Ga., 808, discuss the whole subject fully, and we quote from the last name case this language as furnishing the philosophy of the rule:

> "The decision complained of and the error alleged to exist therein ought to appear plainly. This is fair to the judge whose judgment it is sought to reverse, so that he can make such facts appear, or require such evidence and record to be brought to this court, as may be necessary for a proper consideration of the errors complained of. To allow a mere general assignment which, without more, would not direct the attention of the judge to the real question, and then to hunt for something covered up in such generalities as a ground for reversal, *would be very much like allowing him to be ambushed.* (Italics ours). It is fair to the adverse counsel or party, in order that he may know what he must meet in this court. It is fair to this court, in order that there may be clear-cut questions for them to decide, and not an indefinite complaint for them to wander through in search for questions to determine and errors to reverse."

Applying these principles to the assignment of error in this case, we submit that, while the assignment made was much expanded *in words*, the words used added nothing to the sense of it, and at last it amounted in substance to nothing more than this,

> "That the decree was erroneous and contrary to law and contrary to the evidence in said case and without evidence to support it." (*see transcript p. 61*).

This we say did not point out to the court any specific reason why these things are so, and did not hint at or suggest any such special line of argument as is

now set up in the brief of counsel, touching any alleged expiration of the charter of the Collins Park Company. It "ambushes" the trial court. It failed to put adversary counsel on notice, and required the Georgia court to "wander through" the record, all which things are condemned in the cases cited from the 133d and 147th. And these things are aggravated by the fact that no such question is made in the original pleadings.

Had the pleadings made such an issue, it is conceivable that counsel for the City of Decatur might have had abundant answer to it, as, for instance, that the Collins Park & Belt Railroad had secured some new permit from the city, or that it had amended its charter under the provisions of Code Section 2596, thereby extending its duration. No such issue being made by the pleadings there was no occasion for such answer or replication or any other.

So, if the assignment of error had raised any such issue, the court could, and, no doubt, would have appended his certificate that no such question was made or passed on in the case.

Of course the question may arise as to where the burden lies in showing to this court whether there was such a question. On that subject the Georgia court has said,

> "Where there are several things involved in a judgment, the thing complained of ought to be made to appear."
>
> 133 Ga., 705

a dictum which clearly puts the burden, where it logically belongs, on the plaintiff in error.

Quite a similar ruling is involved in the case of *Higgins v. The Cherokee Railroad*, 73 Ga., 160, where the Georgia court said,

> "The bill of exceptions must plainly specify not only the decision complained of, but 'the error alleged' to exist 'therein,' and without a compliance with this requirement, we cannot consider the points, *which, for aught that appears from the record, are presented for the first time in this court.*"

In *Fidelity & Deposit Co. vs. Anderson*, 102 Ga., 551, attention was called to the fact that, where the court passes on both law and fact, such a general assignment does not inform the appellate court whether he complaint relates to the law or the facts, and in the *Patterson vs. Beck* case already cited the court said,

> "Let us take a few illustrations, that the necessity and propriety of such a rule, duly applied, may be shown. Suppose that a case were submitted to a judge without a jury, in which there were various issues of law and of fact, and that he should render a general judgment in favor of the plaintiff for a sum of money. What question would a mere general exception that this was error present to this court for decision? Would it mean that the judgment on the facts was contrary to the evidence, or without evidence to support it, or that the judgment was for too large a sum? Or that, without complaining of the finding on the facts, there was some error of law? And what error? Thus in *Wade v. Watson*, ante 608, the judge passed on issues both of law and fact, and there was a mere general exception. Even where there was an agreed statement of facts, it has sometimes been held that a mere

> exception to a general judgment by the judge without a jury was insufficient, as the real complaint might be that the judgment was too large or too small, or bore interest, or that the rate of interest used was wrong, or that there should be no recovery at all under the law, or perhaps other matters. Others instances might be added, but these will suffice. Where there are several things involved in a judgment, the thing complained of ought to be made to appear."

And so, in *Hart vs. Phoenix Ins. Co.* in 113 Ga., 862, a case cited and discussed in *Patterson vs. Beck* at page 706, it was said:

> "The bill of exceptions fails signally to show that any such points were made in and passed upon by the trial court. But for the statements in the brief of counsel for the plaintiff in error, *there would be no ground for even surmising that anything of the kind occurred,*"

a statement which fits this case like a glove.

SUPREME COURT OF THE UNITED STATES.

No. 363.—October Term, 1929.

Georgia Power Company, Petitioner, *vs.* City of Decatur.	On Writ of Certiorari to the Supreme Court of the State of Georgia.

[May 19, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

The city of Decatur brought this suit in the superior court of DeKalb county against the Georgia Railway and Electric Company and the Georgia Railway and Power Company. The former was the owner and the latter was the lessee and operator of a system of street and suburban railway lines of more than 200 miles serving Atlanta, Decatur and other places in that part of Georgia. Before trial, they consolidated and became the Georgia Power Company, and it was made the defendant. The city prayed, and the court granted, a decree permanently enjoining petitioner from violating an ordinance passed by the city March 3, 1903, from violating a contract of April 1, 1903, based upon the ordinance, and from ceasing to operate about a mile of its line in Decatur. The decree was affirmed by the state supreme court. 168 Ga. 705.

Prior to the commencement of this suit it had been finally adjudged in litigation between the city and petitioner's predecessors that the ordinance and contract bound the carrier not to charge more than five cents per passenger between points on that stretch of track in Decatur and the terminus of the line in Atlanta and required it upon the payment of each full fare to give to the passenger a transfer ticket that would entitle him for one fare to ride between points on such track and points on any of the carrier's lines in Atlanta. It was also held that the state railroad commission was without authority to change rates that are established by contract. *Georgia Ry., &c. Co.* v. *Railroad Comm.*, 149 Ga. 1. *Georgia Ry. & Power Co.* v. *Town of Decatur*, 152 Ga. 143. *Georgia Ry. & Power Co.* v. *Decatur*, 153 Ga. 329; 262 U. S. 432. The

duration of the defendant's obligation to operate that line or to serve for such contract fare was not determined.

August 14, 1919, the commission fixed the carrier's fares other than those covered by the contract at six cents; September 22, 1920, it raised them to seven cents, and December 15, 1927, it made them ten cents per passenger but required the carrier to sell four tickets for thirty cents. The cost of the transportation covered by the contract fare, exclusive of any compensation for the use of property employed to furnish the service, exceeds the revenue derived therefrom and is substantially higher per passenger than the cost of service covered by the fares fixed by the commission. An ordinance of the city of Decatur passed May 15, 1925, directed paving of the streets occupied by the line in question and the assessment of a substantial portion of the cost against the lessee. Thereupon lessor and lessee offered to surrender to the city the permit for the operation of the line and the lessee notified the city that at a time specified it would discontinue the service. The city refused to accept the surrender and promptly brought this suit.

Petitioner maintained below and here insists that the franchise and the rate contract expired August 16, 1919, and that its obligation to operate the line or keep the five cent fare in force was terminated by such offer and notice. See *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 184. It contends that the rate is confiscatory, that the decree requires it to operate the line and to serve for the five cent fare and that, if compelled so to do, it will be deprived of its property without due process of law in violation of the Fourteenth Amendment.

This court has recently held that the usual permissive charter of a railroad company does not oblige the company to operate its railroad at a loss; that, where it is reasonably certain that future operation will be at a loss, the company, in the absence of contract obligation to continue, may cease, and if in such circumstances the company be compelled by the State to continue to operate at a loss, it would be deprived of its property without due process of law. *Railroad Commission* v. *Eastern Texas R. R.*, 264 U. S. 79. The State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. *Chicago, Burlington, &c. R'd* v. *Chicago*, 166 U. S. 226, 234. *Raymond* v. *Chicago Traction Company*, 207 U. S. 20, 36. We are therefore required to pass upon

the merits of petitioner's claim. *Stearns* v. *Minnesota*, 179 U. S. 223, 232. *Ward* v. *Love County*, 253 U. S. 17, 22.

By an Act of the Georgia legislature passed August 16, 1889 (Acts 1888-89, p. 211) the Collins Park and Belt Railroad Company was incorporated and empowered to construct and operate street railways in Atlanta, in other parts of Fulton county and in DeKalb and other counties. Subsequently its name was changed to the Atlanta Rapid Transit Company. It applied for and the town of Decatur by ordinance passed September 4, 1899, granted to it a "franchise" to construct and operate the line in question. The Act does not specify the term of the company's charter and there is nothing in it or in the ordinance to fix the duration of the carrier's obligation to operate the line. January 1, 1902, the Georgia Railway and Electric Company was incorporated for the term of 101 years and was empowered by the Act under which it was organized to acquire and operate street and suburban railways. Acts 1892, p. 37. On March 28, 1902, the Atlanta Rapid Transit Company conveyed all its property to the last mentioned company. March 3, 1903, the town of Decatur by ordinance granted the latter permission to discontinue operation and remove one of its Decatur lines upon the condition that it should continue to operate the stretch of track here involved and "never charge more than five cents for one fare" for the transportation above described. And April 1, 1903, the town and the company made a contract by which each agreed to do all the things required to be by it performed under the terms of the ordinance. October 16, 1911, the Georgia Railway and Power Company was incorporated as an interurban and street railroad company for the term of 101 years, and January 1, 1912, the Railway and Electric Company leased all its lines of railway and other property to the latter for a term of 999 years.

It may be assumed, as contended by petitioner, that under the state law (Code, § 2215) the charter of the Collins Park Company expired August 16, 1919, thirty years after passage of the special Act, and that it was not bound by its franchise to continue to operate the line after that date. See *Turnpike Co.* v. *Illinois*, 96 U. S. 63, 68. The petitioner contends that the ordinance of September 4, 1899, was the only franchise for the operation of the line in question, and that the obligation to operate the line and main-

tain the contract fare ended with the expiration of the charter of the Collins Park Company.

But franchises for the construction and operation of street railway lines are granted by the State. And January 1, 1902, the State chartered the Georgia Railway and Electric Company. In this case the supreme court held (p. 709) that under the state constitution (Code, § 6448) "all that towns and cities have to give to the construction of passenger street-railways within the limits of the same is the consent of the corporate authorities." And it held that by the contract of April 1, 1903, the city of Decatur gave its consent for the use of its streets by the Electric Company. We accept that court's construction of the Acts of the legislature and the ordinance and its decision as to the effect of the contract of April 1, 1903. Upon the conveyance by the Atlanta Rapid Transit Company the system, including the Decatur line in question, passed to the Georgia Railway and Electric Company, to be operated under the franchise granted to that company by the Act of the legislature under which it was incorporated. It is clear that this franchise and the rate contract of April 1, 1903, are still in force.

There is nothing in the ordinance or contract to indicate a purpose to terminate the obligation of the carrier in respect of the five cent fare while it continues to operate the line as part of its system under its present franchise (*Fort Smith Traction Co.* v. *Bourland*, 267 U. S. 330), and the contract will continue to bind petitioner during the period intended by the parties unless earlier altered by them or relaxed by state authority. *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 438. The losses attributable to the stretch of track in question and the five cent fare are immaterial while the rate contract continues. *Public Service Co.* v. *St. Cloud*, 265 U. S. 352, 355. *R. R. Commission* v. *Los Angeles R. Co.*, 280 U. S. 145, 152.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.